(24,497)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 316.

SUSIE A. TYRRELL, AS ADMINISTRATRIX OF THE ESTATE OF CONRAD E. TYRRELL, DECEASED, PETITIONER,

vs.

THE DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 24, 1916.

1 In the Court of Appeals of the District of Columbia.

No. 2600.

DISTRICT OF COLUMBIA, &c., Appellant,
vs.
SUSIE A. TYRRELL, &c.

Supreme Court of the District of Columbia.

At Law. No. 54691.

SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased, Plaintiff.
vs.
DISTRICT OF COLUMBIA, a Municipal Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Declaration.

Filed May 27, 1912.

In the Supreme Court of the District of Columbia.

At Law. No. 54691.

SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased, Plaintiff,
vs.
DISTRICT OF COLUMBIA, a Municipal Corporation, Defendant.

The plaintiff Susie A. Tyrrell is the duly appointed and qualified administratrix of the estate of her husband, Conrad E. Tyrrell, deceased, by virtue of an order duly passed by the Supreme Court of the District of Columbia, holding a Probate Court, in administration cause No. 18631, and she now brings her letters of administration in that behalf, into this Court, and, as such administratrix, sues the defendant, the District of Columbia, a municipal corporation, for that, on, heretofore, to wit: the second day of September, 1911, and for a long time prior thereto, the defendant, the District of Columbia, as such municipal corporation,

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was seized and possessed of and owned in fee simple certain real estate known as lot numbered 15 and lots numbered 18 to 22, both inclusive, in square numbered 444 in the City of Washington, in the District of Columbia, and on the day and year aforesaid, and for a long time prior thereto a part of defendant's real estate as aforesaid was improved by, and the defendant maintained thereon a certain school house, known as the McKinley Manual Training School, and for that the said defendant, by its proper agents and officials did, on or about the month of April, 1911, let a written contract to certain contractors and builders, to construct an addition or annex to said school building, and also to do and perform certain work in the said McKinley Manual Training School building, and in the basement thereof, that is to say, in the said structure or building which existed on the said real estate of the defendant, the District of Columbia, at the time of the letting of the contract aforesaid, and shortly after said contract was let, to wit: in the spring or summer of 1911, the said contractors and builders did undertake and commence the performance of the work aforesaid and were engaged in the performance thereof during all of the times hereinafter mentioned; and, for that, said contractors and builders, shortly after the making of said contract with the District of Columbia, and prior to the happening of the grievances hereinafter mentioned, contractors and builders, who were engaged in the performance of their said work, did employ certain sub-contractors to do and perform various parts of the work arising under said original contract with the District of Columbia, and one G. W. Forsberg, a machinist, was employed as a sub-contractor to perform certain of the work arising under the contract aforesaid, and among other things, said G. W. Forsberg was engaged and employed, on, to wit: July 1, 1911, to install a smoke-box over a certain furnace and to install certain boilers in the basement of said McKinley Manual Training School Building, and said Forsberg employed plaintiff's intestate as foreman and superintendent of the said work of installing the smoke-box aforesaid, in the basement of said McKinley Manual Training School Building; and, for that, the said defendant, by its agents and servants, had knowledge that said school building was, on to wit: September 2, 1911, and for a long time prior thereto had been, supplied with illuminating gas, which said gas was then and there conveyed and communicated from a certain gas meter, through pipes, located and stationed in and upon the premises and in the basement of the defendant's said building, to wit: McKinley Manual Training School Building, and said illuminating gas, as the said defendant, by its proper officials, servants, agents and employés at all times well knew, was inflammable, combustible and highly explosive and dangerous to human life and to property, unless such gas was properly confined and protected from escape; and, for that, on the day and year last aforesaid, and
3 for a long time prior thereto, the defendant, by its agents, servants and employés, was engaged in maintaining said manual training school on its said real estate and in and upon its said premises, and said defendant, by its agents and servants, was

using sail illuminating gas in its said building; and it then and there, at all times, became and was the duty of the defendant, by its agents, servants and employés, to maintain said gas meter and defendant's said gas pipes, in and upon its said premises and in the basement thereof, so as not to cause injury to persons lawfully in and upon said premises and in the said basement of said building; it then and there became and was the further duty of the defendant, by its agents and servants, in the event the said gas pipes in and upon the said premises of the defendant, became or were injured, impaired, or became loosened or damaged to such an extent that said gas escaped from such pipes into defendant's said building, or in the basement thereof, as to cause injury to persons lawfully in and upon said premises and in the basement thereof, after due notice thereof to the defendant, by its agents, servants and employés, to repair promptly the said pipes and with due care and caution to stop or prevent such leakage or such escape, as aforesaid, of such gas, so that the same would not be and become dangerous to the lives of persons lawfully in and upon said premises and in the basement thereof.

And the plaintiff says that prior to the happening of the grievances hereinafter mentioned, and on, to wit: September 1, 1911, the defendant, by its agents and servants received due notice and it had knowledge that defendant's said gas pipes located in and upon defendant's real estate and in and upon its said premises, and in the said basement thereof, were damaged, injured and impaired, and in a bad state of repair, and that said gas was then and there escaping out of and from defendant's said pipes, into the open basement and into other parts of the defendant's said premises, on, to wit: September, 1, 1911, and on, to wit: September 2, 1911, and prior to the happening of the grievances hereinafter complained of.

Yet the said defendant, by its agents, servants and employés, notwithstanding due notice to it, as above set forth, and wholly disregarding its duties in the premises, and wholly neglecting the same at the time and place aforesaid, in the City of Washington, in the District of Columbia, did, prior to, and on, to wit: September 1, 1911, and on, to wit: September 2, 1911, prior to the happening of the grievances hereinafter mentioned, carelessly, wrongfully and negligently allow and permit defendant's said gas pipes in its said premises and in the said basement thereof, to be and remain in an unguarded, unprotected, and dangerous condition, and in a bad state of repair, when said gas was leaking from and coming out of defendant's said pipes into defendant's said premises and into the open space in the basement thereof, and it did carelessly, wrongfully and negligently fail and neglect to cap, plug or close said unguarded and leaking gas-pipes, from which said gas was leaking as aforesaid, and it did negligently fail to turn off the said gas after being duly notified, on, to wit: September 1, 1911, and prior to the happening of the grievances hereinafter complained of, that
4 said gas was leaking and coming from its said gas-pipes into the basement as aforesaid and on and through defendant's said premises, and it did negligently, fail and neglect prior to the

happening of the grievances hereinafter mentioned, to cause a reasonable inspection of its said gas-pipes aforesaid, or to give proper attention to, or repair said leaking gas-pipes, after said defendant had due notice thereof, as aforesaid, and prior to said grievances, in consequence whereof, said gas escaped and was escaping from said pipes on, to wit: the first and second days respectively, of September, 1911, into and throughout said premises and into the basement thereof, as aforesaid, and for that, on, to wit: September 2, 1911, the plaintiff's intestate was lawfully in and upon said premises and in the basement thereof, in the due course of his employment as aforesaid, and without any negligence on his part, an explosion of gas then and there occurred, as a direct result of the negligence as aforesaid of the defendant, by its agents and servants, and plaintiff's intestate then and there, by reason of said explosion, sustained mortal injuries, and he died on, to wit: September 3, 1911, as a result of said mortal injuries.

And the said plaintiff further says that the injuries to plaintiff's intestate, which resulted in his death, as aforesaid, were such that, if death had not resulted therefrom, would have entitled him to have maintained and recovered damages of and from the defendant. And the said decedent left him surviving his widow, and one child, an infant son of, to wit: three years, who have suffered great pecuniary loss by reason of his death.

Wherefore, the plaintiff as administratrix as aforesaid, by reason of the statute in such case made and provided, has become entitled to recover damages of and from the defendant, and therefore brings this suit, and claims damages from and of the defendant, in the sum of Ten thousand ($10,000) dollars, besides the costs of this action.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

Endorsed: Leave is hereby granted to file without making deposit for costs to clerk or marshal.

Plea.

Filed June 19, 1912.

* * * * * * *

The defendant, the District of Columbia, a municipal corporation, for a plea to the declaration filed in above entitled case, says that it is not guilty in manner and form as in said declaration alleged.

E. H. THOMAS, (P. H. M.)
Attorney for the District of Columbia.

5 *Joinder of Issue.*

Filed June 20, 1912.

* * * * * * *

The plaintiff joins issue upon the plea of the defendant.

ALEXANDER H. WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

Amendment to Declaration.

Filed May 15, 1913.

* * * * * * *

Leave of the court being first had and obtained, the plaintiff files this amendment to the original declaration heretofore filed in this cause, to be known as Count No. 2.

The plaintiff Sue A. Tyrell is the duly appointed and qualified administratrix of the estate of her husband Conrad E. Tyrell deceased, by virtue of an order duly passed by the Supreme Court of the District of Columbia, holding a probate court, in administration cause No. 18631, and she now brings her letters of administration in that behalf into this court, and, as such administratrix, sues the defendant, the District of Columbia, a municipal corporation, and says for that on, to wit: the second day of September, 1911, and for a long time prior thereto, said defendant was seized and possessed of and owned in fee simple certain lots of land in square numbered 444, in the city of Washington, District of Columbia, and on the day and year last aforesaid, and for a long time prior thereto, a part of defendant's said real estate was improved by, and the defendant owned and possessed a certain school house or school building, known as McKinley Manual Training School, and for that the defendant, by its proper agents and officials, in accordance with and pursuant to an Act of Congress in that behalf, did in the month of December, 1910, or the early part of 1911, let a certain written contract to certain contractors and builders, to construct an addition or annex to said school building, and also to do and perform certain work in the said McKinley Manual Training School building then existing upon said defendant's real estate, that is to say, in the basement of the said structure existing upon said defendant's real — at the time of *the time of* the letting of the contract aforesaid, and shortly after said original contract was let, to wit: in the spring of 1911, the said contractors and builders did undertake and commence the work aforesaid and were engaged in the performance thereof during all of the times hereinafter mentioned; and for that, said original contractors and builders, shortly after the making of said contract with the defendant, and prior to the happening of the grievances hereinafter mentioned, said
6 contractors and builders did, with the consent, acquiescence and full approval of the defendant, by the commissioners

of the District of Columbia and the Municipal Architect of said District of Columbia, acting for and in behalf of the defendant, employ certain sub-contractors to do and perform various parts of the work arising under the said original contract with the defendant for the performance of the work aforesaid, and one G. W. Forsberg, a machinist, was employed by said original contractors, with the full consent and approval of said defendant, by its proper officials as aforesaid, to perform certain of the work arising under the contract aforesaid, and among other things, said Forsberg was duly engaged and employed on, to wit: July 1, 1911, to install a smoke box over a certain furnace and to install certain breeching and also repair certain boilers in the basement of said defendant's structure and building which existed upon said defendant's real estate, as aforesaid, at the time of and before the making, execution and delivery of the original contract for the addition to or annex to said mentioned building; and for that, the defendant, by its proper officials servants and agents, had knowledge that defendant's said building was, on, to, wit, August 31, 1911, and on, to wit, September 1, 1911, and on, to wit, September 2, 1911, and on, to wit, September 3, 1911, and for a long time prior thereto namely, since the year 1902, supplied with illuminating gas, for the service of which gas in the defendant's said original school building, which existed upon the defendant's said real estate prior to and at the time of the making of the said contract aforesaid, the defendant, by its proper officials and agents, had contracted to and did pay the Washington Gas Light Company, a corporation, which said gas, during all the times aforesaid, was conveyed and communicated from a certain gas meter, through pipes, located and stationed in and upon the premises and in the basement of defendant's said building, to wit, the original building known as the McKinley Manual Training School, and said illuminating gas, as the said defendant, by its proper officials, servants, agents and employés, at all times well knew, was inflammable, combustible and highly explosive and dangerous to human life and limb and to property unless such gas was properly confined and protected from escape from leaking gas pipes; and, for that, at all of the times aforesaid mentioned, the defendant, was using said illuminating gas in its said building.

And whereas the Commissioners of the District of Columbia, in accordance with the provisions of certain acts of Congress and under the authority thereof, did, more than a year prior to the happening of the grievances hereinafter mentioned, make, publish and ordain certain Police Regulations, in and for the District of Columbia, which were in force and full effect at all of the times mentioned herein, and prior thereto, and one of said Police Regulations, is known as Section 8 of Article 2, of the Police Regulations of the District of Columbia, is as follows:

"Sec. 8. The Chief Engineer, the Fire Marshal and his deputies, and the Battalion chief engineers of the Fire Department, are and each of them is, authorized and empowered to enter any
7 building or premises within the District of Columbia for the purposes of examining or causing to be examined the stoves

and pipes therein, ranges, furnaces, and heating apparatus of every kind whatsoever, including the chimneys, flues, and pipes with which the same may be connected, engine rooms, boilers, ovens, kettles, and also chemical apparatus or other things which is his opinion may be dangerous in causing or promoting fires, or dangerous to the fireman or occupants in case of fire; and upon finding any of them defective or dangerous, or in any manner exposed or liable to fire, from any cause, he shall report the same and issue orders or special directions, either printed or written, directing the owner or occupant to alter, remove or remedy the same in such manner and within such reasonable time as may be necessary, and in respect thereto may authorize and direct the use of such materials and appliances as shall be deemed proper and necessary; and in case of refusal so to do within the time prescribed by such orders or directions the party offending shall, on conviction, be fined not less than one dollar nor more than forty dollars for each neglect or refusal."

And

"Sec. 10, Article 2: The Chief Engineer, the Fire Marshal and his deputies, and the battalion chief engineers of the Fire Department, are, and each of them is, authorized and empowered whenever the public safety requires the same to enter into and upon all buildings and premises, at all reasonable hours, for the purposes of examination; and whenever any of said officers shall find in any building or upon any premises combustible or inflammable material or other conditions in his or their judgment dangerous to the safety of such building or premises, or likely to obstruct or interfere with the members of the Fire Department in the event of a fire therein, he or they shall order the same to be removed or remedied, and such order shall be forthwith complied with by the owner or occupant of said building or premises; provided, however, that if said owner or occupant of said building or premises shall deem himself aggrieved by such order he may, within twenty-four hours thereafter, appeal from such order to the commissioners of the District of Columbia, and unless said order is by them revoked, it shall remain in force and be forthwith complied with by said owner or occupant. The Fire Marshal shall make an immediate investigation as to the presence of combustible material or the existence of inflammable conditions in any building or upon any premises upon complaint of any person or property having an interest in the said building or said premises adjacent thereto. Any owner or occupant of any building or premises failing to comply with the orders of the Fire Marshall or his deputies the Chief Engineer, or the Battalion Chief Engineers of the Fire Department, made in compliance with and upon the authority of the provisions of this section, shall, upon conviction thereof, be punished by a fine of not less than ten dollars, nor more than forty dollars; and any owner or occupant of any building or premises who shall wilfully obstruct or interfere with any of said last mentioned officers in the performance of their above specified duties, shall, upon conviction thereof, be punished by a fine of not less than one nor more than forty dollars."

And it became and was the duty of the defendant, by its agents, servants and employés, to maintain defendant's gas pipes, in and upon the defendant's premises and in the basement thereof, so as not to cause injury to persons lawfully in and upon the said premises and in the basement of said building.

And it also became the duty of the defendant, by its agents and servants, in the event the defendant's said gas pipes in and upon the defendant's said premises, became or were injured, impaired, or became loosened or damaged to such an extent that said gas escaped, or was escaping from such pipes into the defendant's said building, or in the basement thereof, as to cause injury to or be dangerous to persons lawfully in and upon said premises and in the basement thereof, while such persons were performing work for and on behalf of the said defendant, after due notice thereof to the defendant, by its agents, servants and employés, to repair promptly the said pipes and with due care and caution to stop or prevent such leakage or such escape of such gas, as aforesaid, so that the same would not be and become dangerous to the lives of persons lawfully in and upon said premises and in the basement thereof.

And it also became and was the duty of the defendant, by its agents, servants and employés, upon due notice to said defendant, its agents, servants and employés that the said gas was escaping in the defendant's said building and in the basement thereof, to promptly comply with all of the provisions of the said Police Regulations hereinbefore set forth.

And the plaintiff says that prior to the happening of the grievances hereinafter mentioned, that is to say, on, to wit, August 31, 1911, and on, to wit, September 1, 1911, and on, to wit, September 2, 1911, the defendant, by its agents and servants, and by its special inspector, supervising the work being performed at, in and upon defendant's said building, received due notice, and was advised, and the defendant had knowledge, on all of the days last aforesaid, that defendant's said gas pipes located and stationed in and upon defendant's said real estate, and in and upon its said premises, and in the basement thereof (in which said basement plaintiff's intestate was duly performing his work under the said contract between the defendant and said original contractors, which said work of the plaintiff's intestate was then and there being performed by him with the knowledge, full consent and approval of the defendant, by its proper officials, agents and servants) were damaged, injured and impaired and in a bad state of repair, and that said gas was then and there escaping out of and from defendant's said pipes, into the open basement aforesaid, and into other parts of the defendant's said premises, on to wit: August 31, 1911, and from said date said gas continued to so escape up to and including the time of the happening of the grievances hereinafter mention.

Yet the said defendant, by its agents, servants and employés, notwithstanding the said due notice to it, as above set forth,
9 and wholly disregarding its duties in the premises, and neglecting the same at the time and place aforesaid, did, prior to, and on, to wit: September 1, 1911, and on, to wit: September 2,

1911, prior to the happening of the grievances hereinafter mentioned, carelessly, wrongfully and negligently allow and permit defendant's said gas pipes in its said building, premises and in the basement thereof, to be and remain in an unguarded, unprotected and dangerous condition, and in a bad state of repair, when the said gas was leaking from and coming out of defendant's said pipes into defendant's said premises and into the open space in the basement thereof, and after the said notice to the defendant, its agents, servants and employees, on August 31, 1911, the defendant, by its agents and servants, did carelessly, wrongfully and negligently fail and neglect to cap, plug or close said unguarded and leaking gas pipes, from which said gas was leaking as aforesaid, and the defendant, by its agents and servants, after being duly notified on August 31, 1911, negligently and carelessly failed to turn off the said gas, and negligently failed to cause a reasonable inspection of its said gas pipes, in the defendant's said building and in the basement thereof, or give proper attention to, or repair said leaking gas pipe, on August 31, 1911, or on September 1, 1911, or on September 2, 1911, prior to the said grievances hereinafter mentioned; and the defendant, its agents, servants and employés, after being notified on August 31, 1911, that said gas was escaping from defendant's said pipes in its said building, and in the basement thereof, where plaintiff's intestate was lawfully employed for and on behalf of the defendant, as aforesaid, failed and neglected, to cause the Chief Engineer, the Fire Marshal, and the battalion chief engineers of the Fire Department to enter the said building or premises of the defendant for the purposes of examination of the said gas pipes, which said leaking gas pipes were then and there in a dangerous condition, or dangerous to firemen or occupants in case of fire, and said gas pipes were then and there defective or dangerous, and exposed and liable to cause fire, and said defendant, by its agents and servants, after said notice to it, failed and neglected to alter, or remedy the same, and within a reasonable time prior to the happening of the grievances hereinafter mentioned, and by reason whereof, the said defendant, by its agents and servants, failed and neglected to comply with the provisions of Section 8, Article 2, of the said Police Regulations: and the said defendant, by its agents and servants, after due notice to said defendant, its agents and servants, on August 31, 1911, and on September 1, 1911, and on September 2, 1911, prior to the happening of the said grievances hereinafter mentioned, failed and neglected to cause a reasonable inspection of the defendant's said premises and the basement thereof, for the purpose of examining the said gas pipes, from which gas was escaping into the open basement of defendant's said premises and the public safety required such inspection, and on the said dates last mentioned, combustible or inflammable material or other conditions dangerous to the safety of the defendant's building or premises, existed in and upon the defendant's said premises, and in the basement thereof; and on the dates last mentioned, and each of them, after the notice aforesaid to the defendant, its agents and servants, failed and neglected to cause the Fore Mar-

shal of the District of Columbia to make an immediate investigation of the presence of said combustible material or the existence of inflammable conditions in defendant's said building or upon its said premises, after complaint of person or persons having an interest in the said building or premises or property adjacent thereto, all of which were in violation of Section 10, Article 2, of the Police Regulations of the District of Columbia, and the plaintiff further alleges that by reason of the failure and neglect of the said defendant, by its agents, servants and employés, after due notice to said defendant, its agents and servants, on the dates and at the times aforesaid, of the said leaking gas pipes in the basement or upon the premises of the defendant, and the presence of combustible or inflammable material, or other things in the basement of the defendant's said premises, with the knowledge of the defendant, its agents, servants and employés, on August 31, 1911, and on September 1, 1911, and on September 2, 1911, prior to the happening of said grievances, the said condition constituted and was, a nuisance, and the plaintiff says that on, to wit, September 2, 1911, in the forenoon, or shortly thereafter, plaintiffs intestate was lawfully in and upon said premises and in the basement thereof, in the course of his employment as aforesaid, and without any negligence on his part, an explosion of gas then and there occurred, as a direct result of the acts of negligence of the defendant, by its agents and servants, as aforesaid, and plaintiff's intestate then and there, by reason of said explosion, sustained mortal injuries, and he died on, to wit: September 3rd, 1911, as a result of said mortal injuries.

And the said plaintiff further says that the injuries to plaintiff's intestate, which resulted in his death, as aforesaid, were such that, if death had not resulted therefrom, would have entitled him to have maintained and recovered damages of and from the defendant. And the said decedent left him surviving his widow, and one child, an infant son of, to wit: three years, who have suffered great pecuniary loss by reason of his death.

Wherefore, the plaintiff, as administratrix as aforesaid, by reason of the statute in such case made and provided, has become entitled to recover damages of and from the defendant, and therefore brings this suit, and claims damages from and of the defendant, in the sum of Ten Thousand ($10,000.00) dollars, besides the costs of this action.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

11 *Additional Pleas.*

Filed May 19, 1913.

* * * * * * *

1. The defendant, the District of Columbia, for a plea to the second count of plaintiff's declaration, says that it is not guilty in manner and form as therein alleged.

2. And for a further plea to each and every count of said declaration, the defendant, by leave of Court, says that the plaintiff, as administratrix of above-named intestate, on, to wit, January 17, 1912, pursuant to an order of this Court, executed a release for a valuable consideration and under seal, to Philip F. Gormley and Arthur M. Poynton, who were the contractors with defendant, as alleged in the declaration, and to G. W. Forsberg, named in said declaration, and to certain others named in said release, whereby plaintiff released and forever discharged said persons of and from any and all claims, demands, suits, actions and causes of action whatsoever which the plaintiff, as administratrix aforesaid, had or might have against any or all of said parties by reason of the death caused by accident or otherwise of plaintiff's intestate, Conrad E. Tyrell, while employed at, in and about work at the McKinley Manual Training School, located at 7th street and Rhode Island Avenue, N. W., Washington, D. C., which death was the result of an accident occurring at said McKinley Manual Training School on or about the 2nd day of September, A. D. 1911.

E. H. THOMAS,
Corporation Counsel.
P. H. MARSHALL,
Assistant Corporation Counsel,
Attorneys for Defendant.

Plaintiff's Demurrer.

Filed May 19, 1913.

* * * * * * *

The plaintiff says that the defendant's second plea to plaintiff's declaration, is bad in substance.

ALEXANDER WOLF,
LEVI H. DAVID,
Att'ys for Pl't'ff.

NOTE.—Some of the points of law intended to be argued in support of the foregoing demurrer, are:

(1) Said plea fails to allege that said alleged release was in satisfaction of plaintiff's cause of action against the defendant, or that it was intended so to be;

(2) Said plea fails to allege that said alleged release was in full satisfaction of plaintiff's cause of action;

12 (3) Said plea fails to allege that the tort or cause of action mentioned or referred to therein, was a joint tort committed by the parties mentioned in said plea, and the defendant, the District of Columbia, a municipal corporation;

(4) Said plea fails to allege or set forth that any of the parties mentioned therein was liable to the plaintiff for or growing out of the cause of action or the facts mentioned in plaintiff's declaration;

(5) Said plea fails to allege that any of the parties mentioned in

said plea created or was responsible or in any manner connected with the nuisance complained of in this action.

(6) Said plea fails to definitely or sufficiently, set forth matters and things constituting a release and discharge by the plaintiff of her cause of action in this case.

ALEXANDER WOLF,
LEVI H. DAVID,
Att'ys for Pl't'ff.

Supreme Court of the District of Columbia.

MONDAY, May 19th, 1913.

Session resumed pursuant to adjournment, Hon. Daniel Thew Wright, Justice, presiding.

* * * * * * *

Come again the parties hereto aforesaid, in manner aforesaid and the same jury that was respited yesterday. Thereupon on motion and leave granted the defendant files two additional pleas, to the first of said pleas the plaintiff files a joinder in issue and to the second a demurrer, which demurrer is hereby sustained. Whereupon the trial of the cause proceeds and being given to the jury in charge, they upon their oath say they find herein in favor of the plaintiff and assess the damages in the sum of Seven Thousand Dollars ($7,000.00).

Supreme Court of the District of Columbia.

FRIDAY, June 6th, 1913.

Session resumed pursuant to adjournment, Hon. Daniel Thew Wright, Justice presiding.

* * * * * * *

Upon consideration of defendant's motion for a new trial filed herein, it is ordered that the same be and hereby is overruled and judgment on verdict be entered. Wherefore, it is considered that the plaintiff herein recover of defendant the sum of Seven Thousand Dollars ($7,000.00) damages as aforesaid assessed with interest from this date, together with costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing the defendant by its attorney, Mr. P. H. Marshall, in open court, notes an appeal to the Court of Appeals.

13 Supreme Court of the District of Columbia.

TUESDAY, July 8th, 1913.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

Upon motion of counsel for defendant in above entitled cause, it is ordered, by the Court this 9th day of July, 1913, that for cause

shown the time to submit the bill of exceptions herein be and hereby is extended to August 20th, 1913, and to file the transcript of record on appeal to August 20th, 1913.

Supreme Court of the District of Columbia.

WEDNESDAY, August 20th, 1913.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

Now comes here the defendant by its Attorneys of record and present- to the Court its bill of exceptions taken during the trial of this cause, and the same is taken under consideration.

* * * * * * *

It is this 20th day of August, 1913, ordered that the time for filing the transcript of record in the above entitled cause in the Court of Appeals of the District of Columbia be, and the same is hereby extended to October 1, 1913, inclusive.

By the Court:

WRIGHT, *Justice.*

Supreme Court of the District of Columbia.

WEDNESDAY, September 3, 1913.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

The Court having this day signed the bill of exceptions heretofore submitted herein, now orders the same of record as of the time of the noting thereof at the trial.

Affidavit.

Filed September 3, 1913.

* * * * * * *

I, Roger J. Whiteford, being first duly sworn, on oath depose and say that I am counsel for the defendant in the above entitled cause and that on Friday, August 29, 1913, counsel for plaintiff
14 submitted and argued a motion asking the Court to refuse to sign a bill of exceptions submitted by counsel for the defendant on August 20, 1913, on the ground that said bill of exceptions was submitted one day late but that said Court overruled said motion and immediately thereafter counsel for the plaintiff submitted a bill of exceptions on behalf of the plaintiff to which counsel for the defendant agreed and which was signed by the Court as the bill of exceptions in this cause and a part of the transcript of record on appeal. Further this deponent sayeth not.

ROGER J. WHITEFORD.

Subscribed and sworn to before me this third day of September, 1913.

JOHN R. YOUNG,
By A. W. LEVENSALER,
Ass't Cl'k.

Assignment of Errors.

Filed September 3, 1913.

* * * * * * *

Counsel for the defendant respectfully submit that the Trial Court erred,

1. In overruling objection of counsel for the defendant to question asked of witness Poynton, "Did the District of Columbia, its Commissioners, or the Municipal Architect raise any question or objection in regard to Forsberg doing this work?"

2. In overruling objection of counsel for the defendant to question asked of witness, Frank C. Daniel, "Did you observe the odor of gas either in the assembly room or in the boiler room prior to the explosion?"

3. In overruling objection of counsel for the defendant to questions asked of witness Jordan concerning the expectation of the life of a woman twenty-three years of age, and in good health and the expectation of the life of a child four years of age and in good health in accordance with the mortality tables, said question being asked as a basis for computation of damages.

4. In refusing to permit the counsel for the defendant to offer in evidence a release signed by the plaintiff as administratrix of all of the claims growing out of the accident resulting in the death of her husband.

5. In refusing to instruct the jury that as a matter of law the facts contained in the evidence did not constitute a nuisance.

6. In refusing to instruct the jury as prayed in the first, second, third, fourth, fifth, seventh, ninth, eleventh, thirteenth, fourteenth and fifteenth prayers offered by counsel for the defendant.

7. In instructing the jury that the District of Columbia could be held responsible for the death of Mr. Tyrell for a nuisance under the facts in this case.

8. In instructing the jury that the question of whether or
15 not there was a nuisance is a question of fact to be determined by the jury.

9. In instructing the jury that it was in the duty of the District of Columbia to use a reasonable degree of care in connection with the gas pipes maintained on the premises.

10. In instructing the jury that it was a question of fact for them to determine whether or not the District was in the control of the gas in the pipes of the building.

E. H. THOMAS,
Corp. Counsel;
ROGER J. WHITEFORD,
Ass't Corp. Counsel,
Attorneys for the District of Columbia.

Designation of Record.

Filed September 3, 1913.

* * * * * * *

The Clerk of the Court, will please designate the following as the transcript of record on appeal,

1. (*a*) Declaration, (*b*) Pleas, (*c*) Joinder of Issue.
2. (*a*) Amended declaration (*b*) Pleas, (*c*) Demurrer to second plea, (*d*) Order sustaining demurrer,
3. Memorandum of Verdict.
4. Judgment on Verdict, and Appeal noted.
5. Memo. extending time to submit bill of exceptions & file transcript.
6. Bill of exceptions.
7. Affidavit of counsel for defendant.
8. Assignment of Errors.
9. This designation of record.

E. H. THOMAS,
Corp. Counsel;
RORGER J. WHITEFORD,
Ass't Corp. Counsel,
Att'ys for Defendant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 27, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 54691 at Law, wherein Susie A. Tyrrell, as Administratrix of the Estate of Conrad E. Tyrrell, deceased, is Plaintiff and District of Columbia, a
16–42 Municipal Corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of September, 1913.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk,*
By W. E. WILLIAMS,
Assistant Clerk.

* * * * * * *

43 & 44 *Addition to Record.*

Court of Appeals of the District of Columbia.

October Term, 1913.

No. 2600.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased.

Filed November 25, 1913. Printed December 10, 1913.

45 In the Court of Appeals of the District of Columbia.

No. 2600.

DISTRICT OF COLUMBIA, Municipal Corporation, Appellant,
vs.
SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased.

Supreme Court of the District of Columbia.

Law. No. 54691.

SUSIE A. TYRRELL, Admrx. of the Estate of Conrad E. Tyrrell, Deceased, Plaintiff,
vs.
DISTRICT OF COLUMBIA, Defendant.

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, do hereby certify the annexed to be a true copy of the original Bill of Exceptions as it appears of record in the Clerk's office of said Court in above-entitled cause.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 21st day of November, A. D. 1913.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Bill of Exceptions.

Filed September 3, 1913.

In the Supreme Court of the District of Columbia.

At Law. No. 54691.

SUSIE A. TYRRELL, Adm'r'x of the Estate of Conrad E. Tyrrell, Deceased,
vs.
DISTRICT OF COLUMBIA, a Municipal Corporation.

Be it remembered that at the trial of this cause before Mr. Justice Wright and a jury regularly empanelled and sworn to try the
46 issues joined herein between plaintiff and defendant, the plaintiff to maintain the issues on her part joined offered testimony tending to prove that on the 23rd day of December, 1910, Philip F. Gormley and Arthur M. Poynton, a copartnership trading as the Gormley-Poynton Company, entered into a written contract with the defendant to construct an addition to the McKinley Manual Training School Building located in the City of Washington, District of Columbia, and also to instal certain boilers and smoke-box in the basement of the old building of said McKinley Manual School, which contract and the specifications made part thereof, provided among other things, as follows:

"Addition to boiler plant, piping for power plant, heating and ventilating apparatus, etc.

(1.) The work embraced under this section includes the furnishing and installation, complete in every detail, ready for service, of two additional high pressure water tube, steam boilers, with automatic mechanical stokers, smoke breechings, smoke stack, boiler trimmings, piping connections, etc. * * *"

(2.) "Employees.—The contractor shall employ capable superintendents or foremen to represent him on the work, and they shall received and obey orders from the Engineer. He shall so conduct his operations as to interfere with the work of other District Contractors as little as possible. The other foremen, mechanics, and others employed by the Contractor shall be skilled in the several parts which are given them to do."

(3.) "Inspection.—"Inspectors may be appointed who shall have access to all parts of the work at all times and whose duty it shall be to point out to the Contractor any neglect or disregard of the specifications or contract; but the right of final rejection of the work will not be waived at any time. Upon all technical questions concerning the execution of the work, in accordance with the specifications and measurements thereof, the decision of the Engineer shall be final. Ordinarily, one Inspector will be employed by the District of Columbia for each section of the work under contract; but if, on account of any apparent disregard of the specifications, additional

Inspectors shall be required, they will be employed by the District of Columbia at the rate of $4.50 per diem each, and the cost of the same will be charged to the Contractor."

(4.) "Whenever the word 'Engineer' is used, it is understood to designate the Engineer Commissioner of the District of Columbia, or in his absence his duly appointed Assistant Engineers, Municipal Architect and Inspectors representing him, limited by the special duties intrusted to them."

(5.) "Responsibility.—The Contractor will be held responsible for the care of the building materials delivered at the site and intended to be used in the construction of the building, and for all loss or damage that may accrue to the same, as well as to passers-by or persons employed in or about the building and to owners or occupants of adjoining premises legally affected during the term of his contract. As soon as practicable during the work he shall repair all damage to neighboring property, and leave all perfect."

47 Plaintiff offered in evidence a duly certified copy of her Letters of Administration, granted by the Supreme Court of the District of Columbia, holding a probate court, showing the appointment and qualification of plaintiff as administratrix of the estate of her husband, Conrad E. Tyrrell, as alleged in the declaration in this case, which was received.

Plaintiff also offered in evidence duly certified copies of deeds of the Recorder of Deed's office of said District, from various persons in the District of Columbia, showing title in fee simple in said District of Columbia, a municipal corporation, of the lots of ground, on a portion of which stands the building known as the McKinley Manual Training School, including the old building in the basement of which plaintiff's intestate met his death, as hereinafter set forth.

Whereupon, SNOWDEN ASHFORD, a witness on behalf of the plaintiff, testified, in substance, as follows: I am the Municipal Architect of the District of Columbia; and have been for about 3½ years. The Gormley-Poynton Company commenced work under the aforesaid contract about a week after its date. I had the inspection of all work under that contract. I know William H. German, who was local inspector on said work for the District of Columbia, and he reported to me concerning the work. The work had been in progress about a month before German became Inspector, after which German was there daily until the completion of the work. The old building in which the smoke-stack, boilers, piping and breeching were to be installed under the contract, had been erected about eleven years. I went to the building and saw the work while it was in progress, and at that time the breeching had been put in. I would have repaired any gas pipe in said school building prior to the making of the contract, but in my opinion said contract required the contractor to make good any work disturbed.

(Witness was asked to point out clause in the contract in reference to the duty of the contractor, witness referred to that part of said contract hereinbefore set forth as paragraph 5). Continuing, the witness testified:

I know Thomas Whalen. He is a plumber employed by the District of Columbia Repair Shop. Said Whalen does plumbing work in District of Columbia buildings and has been employed in that capacity for the last five years. Said Whalen is under me as Municipal Architect and in subject to my orders.

On cross-examination, witness testified: The work at the McKinley School was done under my general supervision. Mr. German and Mr. Doyle were the District inspectors. When witness was asked what he meant by witness' "general supervision" he answered: I only made occasional inspections; I had an inspector on the work constantly, who reported to me, in writing. My inspections were made only when some question arose that the local inspector did not feel competent to settle; that the sole purpose for which said German's inspections were made was to see that the contract, plans and specifications made a part thereof, were carried out. Thomas Whalen
48 is in the repair shop of the District, and is immediately under Mr. Story, who is in my office or department in accordance with the Act of Congress.

On re-direct-examination, witness testified: I have no knowledge whether the Gormley-Poynton Company had a sub-contract with Forsberg for work provided for by the aforesaid contract, but I know that said Forsberg was doing work at the building provided for by said contract. Forsberg's men were doing work on the boilers. I was at the building and saw them.

Thereupon, PHILIP GORMLEY was sworn as a witness on behalf of the plaintiff, and he testified, in substance, as follows: In 1910 and 1911 I was a member of the firm of Gormley-Poynton Company. About December, 1910, my firm entered into a contract with the District of Columbia with reference to the McKinley Manual Training School Building and the work was started a few weeks after the contract was signed. The work continued six or seven months and we obtained additional time to complete work, on account of additional work. The date of completion was in September, 1911, before school opened. Gustave W. Forsberg had a sub-contract with Evans Almoral & Company, which latter firm had a sub-contract with Gormley-Poynton Company, for a portion of the work provided for in the aforesaid contract. Forsberg's work was in the boiler room of the old building of the McKinley School, putting in the boilers and the breeching in connection therewith. There were gas pipes in the ceiling of the old building, which were there prior to the commencement of the work under the aforesaid contract with the District. I saw Forsberg's men in the boiler room of the old building. Gormley-Poynton Company and its sub-contractors had nothing to do with the gas pipes in said boiler-room. When the work was commenced under the aforesaid contract gas was being used in the old building and there was a gas meter there. The breeching was being installed by Forsberg in the boiler-room, which was under the assembly hall, in old building. The breeching is a smoke flue to carry off smoke from the boiler, and has nothing to do with illuminating gas plant. The breeching installed under said contract ex-

tended to within about an inch of the ceiling of the boiler-room and there were gas pipes under the floor of the assembly hall immediately over said boiler-room. The gas metre was about one hundred and twenty feet from said breeching. I have no way of telling whether the District of Columbia or the Municipal Architect knew that Forsberg was doing the work of installing the boilers and the breeching, for us. We had a business contract with them and I never notified them.

The witness was asked to state whether or not there was any objection raised by the municipal architect or the commissioners of the District of Columbia to Forsberg doing said work while witness' firm was carrying out their contract, to which counsel for defendant objected, and the court overruled the same; thereupon the witness answered: "They did not object to anyone doing any work that I know of." Continuing, witness testified:

49 I knew that Forsberg had a sub-contract under Evans-Amoral Company and performed work there on the boilers and put in the breeching, but we recognized only Evans Almoral Company. We subdivided other portions of the work.

Witness was asked if any objection was raised by the Municipal Architect or by the Commissioners to witness doing that, to which counsel for the defendant object, which was overruled and defendant, by its counsel, noted an exception. Witness answered: I don't know. We carried out this contract through sub-contractors as we usually always do.

Thereupon, ARTHUR M. POYNTON was sworn as a witness on behalf of plaintiff, and he testified, in substance, as follows: I was a member of the firm of Gormley-Poynton Company. The old building of the McKinley School, in which the boiler-room is located, was erected some years prior to the date of the Gormley-Poynton contract. Gas was used in the laboratories in that building. I saw gas was used in the laboratories while school was in session and saw boys in the laboratories experimenting with Bunsen burners when school was in session. I was formerly Assistant Building Inspector of the District, and had been to the building many times. Forsberg and his men were installing the boilers and doing the breeching work in the basement of the old building.

The following occurred:

"Q. Did the District of Columbia, its Commissioners or the Municipal Architect, raise any question or objection in regard to Forsberg doing this work?" to which question, counsel for defendant objected upon the ground that the Municipal Architect was an independent officer, appointed by Congress and his action in the premises was immaterial, and that the question did not call for the personal knowledge of the witness. Said objection was overruled, and counsel for defendant noted an exception and the same was noted upon the minutes of the court. The witness answered: Not to me; not to my knowledge.

Continuing, witness testified: I know William H. German, who was employed by the District of Columbia, during the time the work,

under the Gormley-Poynton Company contract, was being performed at the McKinley School Building, and said German was called either superintendent of construction or inspector of construction, but I do not know which. German overlooked the construction of the building from the District of Columbia's standpoint. I may have been at the building once a week, once a month or once every day, and sometimes saw German there and sometimes did not.

On cross-examination, witness testified: When I saw German at said building, so far as I know, German was seeing that the plans and specifications of the said contract were being carried out. I never saw German doing anything else.

Whereupon, GUSTAVE W. FORSBERG, a witness sworn on behalf of plaintiff, testified, in substance, as follows:

I am a machinist and boiler-maker, and in 1911 installed the boilers and set up the smoke-stack in the McKinley Manual Training School building. I performed no other work at the building. I had working for me four or five men at the building, one of whom was Conrad E. Tyrrell. I also had several colored men working there for me. One was named Datcher, another, Moore, and another named Green. I do not know where Green is now. I was at the building while the work was going on. The whole job I was doing took about six weeks or two months.

Whereupon the following occurred:

Q. Do you know William H. German? A. Yes sir.

Q. He was there as the District of Columbia's representative, I believe? A. I believe he was.

Q. Did he supervise your work too?

The Court: Is there any dispute on this point, Mr. Marshall; that is as to whether or not the District had an inspector there.

Mr. Marshall: Mr. German was there and he was the District Inspector.

I know that an accident happened to Tyrrell in the McKinley Manual Training building—in the old building, where my work was going on, where we put up the new boilers. Tyrrell, at the time he met his death there, was a boilermaker for me. He had worked for me four or five years. At this last time, he had been with me only about one year. He got $2.50 a day and sometimes he made extra time. He earned $15.00 a week while working for me, and now and then he made some extra time, which extra time amounted to about $150.00 a year. I was not at the building when the explosion occurred. I had nothing to do with the gas pipes in the building, nor with the metres there. I do not know whether there were any gas pipes there. My work was to instal two boilers in the old building; that, in reference to the boilers, the breeching came off the top of the boilers and ran to the north which would be the north wall of the fire-room, and parallel to them close to the ceiling and into a stack which we erected. This breeching is composed of steel, riveted with heavy inch rivets—it makes a draft, the same as a stove pipe from a stove. We had nothing to do with the gas pipes

or heating pipes or any other pipes. I did not see Tyrrell after he was hurt. I was at this work, or in the boiler-room a day or two before Tyrrell met his death, for one-half or three-quarters of an hour, and was on top of the boiler where Tyrrell was working, I cannot recall the exact day. Did not observe any odor of gas in the basement.

On cross-examination, witness testified: I usually went there once a day, and when I would go there would go up on top of the boiler where Tyrrell was working. I never smelled any odor of gas up there. There were a number of pipes near where this work was going on, but I do not know what kind of pipes they were—some of these pipes were within six inches—where the work was going on.

51 Whereupon, HENRY STORY, a witness sworn on behalf of plaintiff, testified, in substance, as follows:

I have been employed as superintendent of the District of Columbia Repair Shop for about six years, and as such looked after general repairs of buildings for the District, throughout the City, and have under me one hundred to two hundred and fifty men who do all classes of work, such as plastering, carpentry, tin-ing work, plumbing, painting—every class. At the District Repair Shop a regular complaint book is not kept, but a telephone book is kept, and in — are put messages received from the different foremen as they go around through the city. When the District Repair Shop is notified that there is a leaking gas pipe in a District building, we repair it.

Witness produced a book showing the entry of complaints of leaking gas pipes located in District of Columbia buildings, in September, 1911, in response to subpœna but said book does not show complaint of a leaking gas pipe, in September, 1911, in the McKinley Manual Training School.

Continuing the witness testified: I do not remember any notice to the Repair Shop in reference thereto. The only thing that I found was a letter in reference to the McKinley School from the Board of Education. I heard of the happening of the accident at the School Building September 2, 1911, but I had no connection with it. I have looked through every book at the D. C. Repair Shop that I could find. The books I have produced here in court contains mostly everything of that nature that comes to the D. C. Repair Shop, in communications. It is only emergency repairs that we would have attended to, which we received notice of over the telephone. The books referred to are records showing when the foremen were at the D. C. buildings. The plumber of the D. C. Repair Shop reports to me daily. The District of Columbia employs mechanics and their names are put on the pay roll which is sent to the Disbursing Officer. The names of said plumbers who are employed at the D. C. Repair Shop, under me, go on the pay roll just the same as other classes of mechanics. We obtain materials through requisitions. I make my reports as to the conduct of the District Repair Shop to the Municipal Architect and followed that course in 1911.

Counsel for defendant announced that he did not desire to cross — the witness.

Whereupon, RICHARD H. SINCLAIR, a witness sworn on behalf of the plaintiff, testified, in substance, as follows: I have been employed by G. W. Forsberg for the last 14 years. I knew Conrad E. Tyrrell for 5 or 6 years prior to his death. Tyrrell was employed by Forsberg as a boiler-maker, at the time he met his death, at the McKinley School building—he was doing some work attached to the boilers there. At that time I was clerk for Forsberg and kept his books. I have brought with me a time paying sheet, showing the amount Tyrrell was earning from Forsberg at the time of the accident. (Witness produced the same) Tyrrell was earning $2.50 per day. He made over-time. I think Tyrrell came back
52 to work for Forsberg in May preceding his death. Tyrrell had worked for Forsberg before that, but I think he went down to the country and came back in May. When Tyrrell worked on Sunday he drew two days' pay for one day's work.

Whereupon, WILLIAM MOORE, a witness sworn on behalf of plaintiff, testified, in substance, as follows:

I am now employed by Merchants' Transfer Company. I worked for G. W. Forsberg in August and September, 1911. I knew Conrad E. Tyrrell. I know Magruder Datcher, who also worked for Forsberg at the time I worked for him. Mr. Tyrrell was foreman for Mr. Forsberg. Tyrrell, Datcher and I, and a man named Fred Green were doing work for Forsberg in the old building of the McKinley School in August and September, 1911. On our first trip to the building, we put up all of the material we had and then had to go back to Forsberg's shop and get more material. Datcher, Green and I were helpers. Fred Green is now in Philadelphia. I remember — day when Tyrrell received his injuries at the McKinley School building. It was Saturday, September 2, 1911. At the time he received his injuries, I was down stairs, holding a sheet of iron, and he called Datcher and asked him to bring a match. Datcher told him that he did not have one, and he called to me and said: "Bill, bring me a match." I said I did not have any. So he said: "Bring me a piece of paper." So I twisted a piece of paper for him. First word he told me was—he tells me that the superintendent told him to look for the leak in the gas pipe. I went up the ladder and gave him the paper. We searched for the leak in the gas pipe. The pipe is on the north side of the school building, that is, on the Rhode Island Avenue side. The whole thing toppled right down on him. I couldn't see but one of his feet. I got him by the hand and pulled him out. It blew me from the three boilers. Prior to that time, Tyrrell, Datcher, Green and I had been working there, (in the basement of the old building of the McKinley School) since Wednesday of that week—we went there on Wednesday, last time, to finish up the job. We had not finished breeching. With reference to the boilers, the breeching ran on the back ends of the boilers from one end to the other. It got to the north side, turned and came out the north end of the smoke-stack. I first smelled the odor of escaping gas on Wednesday preceding the explosion on Saturday, in the basement of the old building. That Wednesday, Tyrrell and I were

there, and on Friday, Green and Datcher were also there. I spoke to Tyrrell about the escaping gas there. The gas was not very strong on Thursday but was getting severer every day up to Saturday evening. When we were taking lunch I told Tyrrell if he didn't say something about the gas we would not be able to stay there until 4 o'clock. We worked there all day Friday. The escape of gas was severe on Friday. I could not say where the gas was leaking. I do not know what Tyrrell meant by the superintendent, but he told me that the superintendent told him to look for the leak in the gas pipe. I did not see what superintendent it was. We had just got through lunch and were fixing to go to work; it was about 12:30, or something like that when Tyrrell came to look for the gas leak—

53 he was lying right flat on his stomach—straight out on the breeching, and there was a space of a hall-way between the boilers where he endeavored to find the gas leak. Then there was a gas explosion. It blew the whole thing on top of Tyrrell. Tyrrell hollored, "Bill, pull me out." I got him and pulled him out. He had a scar on the top his head, and on his chin. I was injured so myself I could not take much notice of Tyrrell. Tyrrell could walk but men had to help him along. He was not able to walk by himself. Datcher and I were in the boiler-room when the explosion occurred. Tyrrell was taken over to the drug store. Mr. Tyrrell went in an automobile and he was taken away. I attended inquest over Mr. Tyrrell's body.

On cross-examination, witness testified: I testified at the inquest and am sure it was Wednesday before the accident that I smelled gas. The gas was very strong on Friday and on Saturday it was still severe. Mr. Tyrrell was at the building at work on Saturday morning. All of us could smell gas very plainly in the boiler-room. It was very noticeable at that time (Saturday)—it was very strong in the boiler-room. Some of the men there in the school building took Mr. Tyrrell to the drug store. I do not know who it was. I guess it was nearly 3 o'clock before they came and took him away in the machine. As far as I know he had no medical attention until they took him away. There were pipes around where the work was going on and I guess something over three feet from where Tyrell was working the pipes were exposed. It was on Wednesday before the accident that we commenced to smell the odor of gas there. When we first went to work there we did not finish the job up. The first time we went up there we worked very nearly a week. The first time I was there, but I have forgotten when that was, I didn't smell any gas. The second time, when we continued work, it was on Wednesday before the accident, and it was then that we smelled the gas.

Whereupon, RICHARD H. SINCLAIR, being re-called, testified, in substance, as follows:

I now have Mr. Forsberg's records kept by me. I brought them from the office of Mr. Forsberg.

The witness was asked to state, from said records, how much extra salary, between May and September, 1911, Conrad E. Tyrrell

earned, to which counsel for defendant noted an objection, which was overruled, and defendant noted an exception, which was entered upon the minutes of the court.

Whereupon, the following occurred:

Q. You need not call the individual items, if you have the totals, give the totals? A. I can only give you the totals for each week. You only want me to give all the weeks in which he did extra time?

Q. The regular salary of $15.00 per week went right along? A. Yes, sir. For the week ending June 17th he made ninety cents extra time; week ending June 24th $4.65; for week ending July 1st $4.65; July 8th, $3.75; July 15th, $3.75; July 22d, $7.50; August 5th $25.60; August 12, $9.30; August 19th $2.15; September 2d, $5.00. That is all.

54 Whereupon, MAGRUDER DATCHER, a witness sworn on behalf of plaintiff, testified, in substance, as follows:

I was working for G. W. Forsberg in the McKinley School building at the time of the explosion that caused the death of Conrad E. Tyrrell. The explosion occurred on a Saturady between 1 and 2 o'clock. At the time of the explosion, another colored fellow named Green and I were cutting and punching holes in the sheet iron for the smoke-box, in the basement of said school building. Mr. Tyrrell and William Moore were there. Prior to the accident, I went to the building on Friday, about 9:30 o'clock, to help these colored fellows and Mr. Tyrrell. On Friday, I observed the odor of gas in the basement of the building. After I got there on Friday and commenced to work I smelled it, but I did not speak about it until about 11 o'clock. Friday was my first day there, but Mose and this other man had been up there all the week. They sent me up there to help them because the work was heavy. I was not personally acquainted with William H. German but I saw him there walking through the building, and "it looked like he had something to do with it." I was on top of the boilers on Friday and said to Mr. German, "Boss, there is gas escaping pretty heavy in here, I cannot stay in this place to work in here." German made no answer to me. This was on Friday, about 11 o'clock a. m. I spoke to German again on Saturday after ten o'clock. He came out the back part of the building, when I again said to him, "Boss, the gas is escaping worser today than it was yesterday." And he did not give me any answer. On Saturday, at 12:30 o'clock, Mr. Tyrrell said to me and Green, "Green, you and Datcher stay down here and finish punching them holes in that iron, and Moses, you come up here with me." Moses went up the ladder and went on the boiler with Mr. Tyrrell. Mr. Tyrrell went away, stayed a little awhile and came back and called Moses to give him a match. Moses said he had no match, and he said: "Hand me a piece of paper", and Moses went up the ladder, carrying Mr. Tyrrell a piece of paper. Mr. Tyrrell had a lantern in his hand. Moses handed him a piece of paper and Mr. Tyrrell went right to work again. Shortly after that I heard this explosion. Moses came from the boiler and called for me to come up and help to get this man out. When I went up the ladder, Moses said, "Come here,"

and Mr. Tyrrell was then sitting aside the boiler with his hand up to his head. I said what is the matter, and Mr. Tyrrell said, "Datcher, my head." I said, "I will help you down the ladder." I went down in front of Mr. Tyrrell and helped him down the ladder. The explosion was the same as if something had burst. I suppose it must have been the gas. I never saw any gas pipes. We were not doing any work on the gas pipes. We were working on the smoke-box. It was dark on the top of the boiler where Mr. Tyrrell and Moses were working, but it was light down below, in the boiler-room. At the time of the explosion, I did not see Mr. Tyrrell. Mr. Tyrrell had gone from three to four yards back. He was hunting for the leak in the pipe. Moses, the other colored men, got Tyrrell out of his position and he and I helped him down the ladder.

55 Mr. Tyrrell was carried across to a drug store on 7th Street.

Mr. Tyrrell was hurt about his head—he had, I think, a hole on the side of his face and one on his chin. At the drug store they gave him a drink of brandy and he threw it up. They telephoned to the shop for the automobile and it came up there. They helped him in and asked him if he wanted to go home or to the hospital and he said, "Take me home."

On cross-examination, witness testified: When I spoke to Mr. German about the odor of gas he did not say anything to me. I did not touch any pipe. We did not know where the pipe was. I first went to the building on Friday between 9 and 10 a. m. Went down in the boiler-room where Tyrrell was working. He showed me what to do. After I went up in the smoke-box I spoke about the gas I smelled. I did not smell it down below, but did up above—that was where Mr. Tyrrell was working. The odor was very plain and strong—and was stronger up there than it was below I never smelled much of it down below, the most of it was up. Mr. Tyrrell had a lamp when I saw him—that was when we went to work, 12:30, just before this explosion took place.

On re-direct examination, witness testified: The explosion caused an injury to the ceiling; some pieces of brick were blown out the side of the wall from the explosion. Where Green and I were, down below, it flew all over the fire-room and it was done so quickly I did not know what it was.

Whereupon, FRANK C. DANIEL a witness sworn on behalf of plaintiff, testified, in substance, as follows:

I became a teacher in McKinley Manual Training School in September, 1902, and have been there ever since. I have been principal of that school since 1912. I recall when the work of the addition or annex to the building was commenced. It was about February 11, 1911. At that time, there was only one building. There have been two previous additions to the original building. The assembly hall is over the boilers. Ever since the building was built, gas has been used there. In September, 1911, the gas metre was in the janitor's little store-room, under the front steps, and I should say, in a direct way, seventy-five feet from the entrance to the boiler-room. I remember when the explosion occurred at the building in September,

1911. I was not in the building at the time. School was not in session. School had closed about June 18, 1911. I returned from my vacation during the last week in August, and upon my return I think I went directly to the school building. I was there off and on from that time to the beginning of school. I spent a great deal of time at the building. My office is in the 7th Street & Rhode Island Avenue corner, which is about fifty feet from the entrance to the assembly hall. In September, 1911, Hyland Maddox was janitor of the building.

Whereupon, the following occurred:

Q. Did you observe the odor of gas, either in the assembly room or in the boiler-room, prior to the explosion?

To which question counsel for defendant objected upon the
56 ground that the witness was not a municipal officer, and that any notice by him would not affect the District of Columbia as a municipality.

The Court: Entirely aside from that question, it is relevant to establish, if he can, if gas was leaking. The witness may answer the question.

The Witness: I noticed the odor of gas. It seemed to be worse at the entrance to the assembly hall. I noticed it first in the corridor between my office and the assembly hall.

The witness was asked to say, approximately, how long or short a time it was before the accident, and he answered:

I returned to the city the latter part of August. It must have been the last week in August, so that, to the best of my knowledge, it could not have been more than a week previous to the 2d of September. I cannot fix it any closer than that. May have been the same day or a day or two previous. I can only judge it by the fact of returning to the city the latter part of August and this happened the first part of September. After I detected the odor of gas, I asked Mr. Maddox, the janitor, to locate the leak, if he could. I also called it to the attention of Mr. Chamberlain, who had charge of the addition to the building on behalf of the Board of Education. Mr. Chamberlain, Mr. Maddox, the janitor, and I tried to locate the leak but we did not succeed—that took place between the time I arrived in the city the latter part of August, and the time of the accident. After that I made no further effort to locate the leak. I know that the janitor continued to hunt for the leak. I am quite sure he did not find it. I was not at the building when the explosion occurred. I did not then go into the boiler-room. The boiler-room was in the old building.

On cross-examination, witness testified:

The gas used in that building was for school purposes, mainly, in the laboratory, not for lighting the building; it was maintained as a school building for the District. I cannot give you the exact date when I returned to the city and just when I went to that building. I know it was at least three days prior to the accident, that I went to the building. That is as close as I can come to it. Cannot say that I noticed the odor of gas on the occasion of my first visit to the building.

On re-direct examination: At the time of the explosion I was acting principal of the McKinley School.

Whereupon, JOHN A. CHAMBERLAIN, a witness on behalf of plaintiff, testified, in substance, as follows:

I have been supervisor of manual training in the public school for about 20 years, and in September, 1911, my office was at the Franklin School. I had occasion to visit the McKinley Manual Training School in connection with the Construction of the third addition thereto because I had a "sort of supervisory work in the construction of the building for the Board of Education." I knew William H. German, and saw him there at work. I was there sometimes daily, and sometimes two or three times a week, and German was there practically all the time that I was. I was in the McKinley
57 Manual Training School about an hour before the explosion, and noticed the odor of gas then. Could not determine where it came from; seemed to be strongest in the assembly hall. Did not make any search for it. I had been down stairs in the boiler-room where the work was going on before I noticed the odor of gas; did not detect any odor of gas down stairs at all; cannot state how long I was in the boiler-room; I was in the assembly hall for a minute or two; did not observe the odor of gas prior to that time; when I observed it I was on my way out of the building, and stopped at the office of Mr. Daniel, the principal, and that is where I first noticed the gas; I spoke to Mr. Daniel about it and he said he had noticed it. I went along the corridor and along the assembly hall where it seemed to be more noticeable, and my recollection is that Daniel said that he had asked the janitor to see if he could locate the leak. I said nothing to German about it. I went into the boiler-room the day after the explosion, and a good deal of the ceiling had been blown out. Could not see the pipe at all, it was up over the boilers, and it was dark there. I could see where the ceiling had been blown off, exposing the terra cotta pipes. Of my own knowledge I cannot say the leaking gas pipe was ever repaired, I suppose it must have been. There was no further escape after that that I know of.

On cross-examination witness testified that this was the only time that he spoke to Daniel about this gas leak.

Whereupon, Dr. HARRISON CROOK, a witness on behalf of the plaintiff, testified, in substance, as follows:

I am a practicing surgeon in this District and have been since 1878. I saw Conrad E. Tyrrell professionally, at his home, at the time he was hurt. It was in the afternoon, I think it was possibly near three o'clock, between two and three, I think, or three and four. I examined him. His skull was badly fractured—in the fore-part of the head in the top, fragments of bones were driven into the brain. I carried him to Providence Hospital, where I operated on him, trephined him, and operated to remove the- bones from the brain and lifted them up as best as I could, and closed up the wound. As a result of his injuries, he died the next day. There may have been little cuts about his face—I do not remember anything special.

I could not tell how those injuries were sustained, but something, evidently, had fallen on him in some way. His death occurred September 3, 1911. I may have testified at the inquest.

On cross-examination, the witness testified:

I could not possibly give the hour I was called to treat Mr. Tyrrell. It was sometime in the afternoon. I imagine it was somewhere near three o'clock. I am not certain as to the time. It seems to me that I did go to an inquest at the Morgue.

Q. How soon after an injury of this character is sustained, Doctor, should a patient be treated? A. How soon?

Q. Yes? A. As soon as it is possible.

Q. What, if anything, is the effect of the delay of several hours in having medical treatment? A. There is usually a hemorrhage.

Q. What effect, if any, has that upon the life of the
58 patient? A. It has a very bad effect, because it causes pressure on the brain.

Q. In other words, if I understand you, there is a much better chance of recovery if the patient is treated immediately after an injury of this character? A. Especially as to the hemorrhage; yes, sir.

It is impossible for me to tell the hour I went there. There is no reason why I should have charged my memory with the hour, but it was sometime after 3 or 4 o'clock. I do not know what time it was. I could not possibly tell, but I went there and I do not see what the hour has to do with it.

Whereupon, HYLAND MADDOX, a witness sworn on behalf of plaintiff, testified, in substance, as follows:

I reside at 641 Q Street. On September 2, 1911, I was janitor at the McKinley School building. I had held that position for about 12 years. I had been there ever since the building was built. In September, 1911, there was no principal at the school. Mr. Daniel was acting principal. I remember when the explosion occurred there. I was employed at the building at that time. About Thursday, I think it was, before the accident, Mr. Daniel brought to my notice the odor of gas in the school building. It was between 9 and 12 o'clock. The man who was under me, went with me to hunt for it; went in the assembly hall to see if we could find it. We did not do anything else. I reported it to Mr. German, the building inspector, on Thursday. He did not do anything. He turned around and walked out. I said to Mr. German, "Mr. German, come in here; I have a leak in here. See if you can help me find it." Mr. German made no reply to me, he walked down and went out the front door in his office. After I reported it to Mr. German, he said nothing to me on either Thursday, Friday or Saturday about it—Mr. German made no attempt to locate it.

On cross-examination, witness testified, in substance as follows: Mr. Daniel, acting principal, called the leak to my attention either Thursday or Friday previous to the accident. Am almost certain that it was Thursday. I went into the assembly hall to look for the

leak because that is where Mr. Daniel told it was. I told Mr. Gormley about the leak at the same time I spoke to Mr. German about it. Mr. Chamberlain did not go with me to look for the leak and was not present when Mr. Daniel spoke to me about it. I did not find the leak. I made no effort to find it in the old part of the building. I am supposed to do a thing of that kind and make a note of it. I made no report other than to tell German because it was contract work. I make my report to the principal, who makes it to the Franklin School and they notify the repair shop, and then the repair shop send someone down who fixes the leak, if it is in the old building; I do not know whether that was done in this case.

Whereupon it was conceded by counsel for the defendant that gas was used in the McKinley Manual School building for public purposes and that the bills for service of gas there were paid by defendant, the District of Columbia.

59 Whereupon, SUSIE A. TYRRELL, duly sworn, testified, in substance, as follows: I am the widow of Conrad T. Tyrrell, who died September 3, 1911. He was twenty-seven years old. My age is twenty-three years. We had one child, a boy, whose name is Milton Eugene. He was born April 5, 1909. Prior to my husband's death, he was in perfect health. His business was boilermaker. I remember the day of the explosion that caused my husband's death. He was brought home that day between 3 and 4 o'clock, as far as I can remember. He was seriously injured about the head. We sent for a physician immediately. Those who arrived said that my husband would need surgical aid and we got Dr. Harrison Crook. I don't remember which doctor arrived first because neighbors helped to get them for me. Dr. Crook came immediately after I called three times. It was after four—between four and six o'clock, as far as I can recollect, when Dr. Crook arrived at my house. I do not suppose he was there ten minutes before he made arrangements to have my husband carried to the hospital. They took my husband to the hospital. I went with him. My husband was at his home two to three hours before we got him to the hospital. I noticed the condition of his head—it was more inward. His injuries were inward.

I am the administratrix of my husband's estate and am the plaintiff in this case. My health and my child's health are good. My husband earned fifteen dollars a week and he also earned extra money. He supported me and our child. He lived with me and our child. He had lived with me ever since our marriage.

Whereupon WILLIAM F. MEYERS, a witness on behalf of plaintiff, testified in substance, as follows:

I am assistant and acting secretary of the Board of Commissioners of the District of Columbia, and identify a minute of said Board dated March 15, 1899, and in force in 1911, which was offered and received in evidence and is as follows:

"The audit at the office of the Superintendent of Repairs is hereby

placed under the immediate control of the Engineer Commissioner. March 15, 1899.

(Signed) JOHN B. WIGHT,
JOHN W. ROSS, AND
LANSING H. BEACH,
Commissioners of the District of Columbia.

Attest:
WILLIAM TINDALL, *Secretary.*"

Whereupon, SIDNEY L. HECHINGER, a witness on behalf of plaintiff, testified, in substance, as follows:

On September 2, 1911, I was engineer and assistant superintendent of the Gormley-Poynton Company employed on the third addition to the McKinley Manual Training School. I smelled gas before the accident happened, but I do not know how many days before, or whether it was the same day. I remember going through the building looking for the gas with Mr. German, the in-
60 spector, before the accident, but cannot tell how many days before. I did not call Mr. German's attention to the leak, and do not know whether Mr. German was the first one who called my attention to it. Somebody called my attention to it. We searched for the leak all over over the building. I think we smelled gas in the assembly hall the first time. I suppose we attempted to search the boiler room; do not remember that exactly; it was almost impossible to search the boiler room for it because it was a large room and had lots of machinery in it, and the lights are high up on the ceiling, and those that were in there were lighted. A plumber could have found the leak I suppose, by using peppermint or whatever they use to try it. I do not know whether peppermint is the proper stuff, but they use some chemical. I do not know how it is done. I know that the gas was not turned off and that peppermint was not put in by me or Mr. German in searching for the leak.

On Cross-examination said witness testified, in substance, that he and German tried to find this leak by walking around the building smelling.

Whereupon GEORGE C. JORDAN, a witness on behalf of plaintiff, testified, in substance, as follows:

I am local manager of the Equitable Life Assurance Society of New York and have been in the life insurance business for more than twenty years, and that according to the American experience table, (which the witness produced while on the stand and which he consulted while testifying) which said tables comprise the experiences in dealing with many thousands of lives at different ages for lengths of years, and the one which Insurance Companies go by in making computation of premium values, etc. The expectation of life, according to the table, of a man 27 years old and in good health would be 37.4 years.

On direct-examination witness was asked the expectation of life of a woman 23 years old and in good health and the expectation of life of a child 4 years of age and in good health in accordance with

the tables, to which questions counsel for defendant severally objected upon the ground that under Sections 1301 and 1303 of the Code the expectation of life of the widow and child are not admissible in evidence, but the Court overruled said objection, to which ruling counsel for defendant then and there excepted, which exception was duly noted upon the minutes of the Court. Witness then answered that the expectation of life at 23 years would be 40.2 years; that said table only begins at ten, and the expectation of life at that age is 48.7, and that at 4 years of age it would run a little longer than that, nearly 50 years.

Whereupon FREDERICK S. VERMILLION, a witness on behalf of plaintiff, testified, in substance, as follows:

I am assistant janitor of the McKinley Manual Training School, and will have occupied that position 3 years on July 1, 1913. About two or three days before the explosion in question I went with Maddox all around the building endeavoring to find a leaking gas pipe.

I first smelled the gas in the assembly hall, and do not re-
61 member going into the boiler-room. I could not locate the leaking gas pipe. I saw Mr. German, the District inspector, at said building the morning before the explosion. I do not know whether German looked for the gas leak, and have no recollection of conversing with him as to the leaking gas pipe.

Whereupon Dr. CHARLES S. WHITE, a witness on behalf of the plaintiff testified, in substance, as follows:

I am deputy coroner of the District of Columbia. On September 3, 1911, I performed an autopsy on the body of the late Conrad E. Tyrrell.

The witness produced his notes of the result of said autopsy. Continuing, he testified:

I found this person a man of middle age, about 150 pounds in weight, muscularly developed. I found an abrasion or bruise between the eyes. On the right side there had been an operation performed and a piece of bone removed from the skull, and under this was a hemorrhage on the right side and also a hemorrhage on the left side of his brain, suggesting that some violence had produced the hemorrhage. The pieces of bone had been removed from the skull, I imagine by an operator, because the wound had been sewed up. I performed the autopsy September 3, 1911, at the Morgue, as deputy coroner.

Whereupon the plaintiff rested.

Testimony of Defendant.

Whereupon, the defendant, to sustain the issues upon its part joined, read in evidence the deposition of WILLIAM H. GERMAN, taken at Raleigh, N. C., who testified, in substance, as follows:

I have been employed at Raleigh, N. C., since September 12, 1912, and my said employment at said city will continue for some

time—I am unable to tell how long. I do not expect to be in the District of Columbia at the time this case is tried, and on account of my present employment I cannot go there to testify. In the month of September, 1911, and previous thereto, I was employed by the District of Columbia, as Inspector of Buildings, under the Municipal Architect, being so employed at the McKinley Manual Training School Building in said District, where an explosion occurred in September, 1911. It was on Saturday. A gas leak in that building was reported to me by the janitor, and after endeavoring to find the leak without success, I asked Conrad E. Tyrrell if he detected any odor of gas among the conduits and piping overhead where he was working. He replied that he did not, and cautioned him not to proceed until the leak had been discovered. I also reported the matter to the man in charge or rather the contractor's man in charge and also later to Mr. Gormley himself. The odor of gas was first detected so far as I know on Friday, a day before the accident. The odor was in the assembly room over the boiler-room,
where Mr. Tyrrell was working. He was working on the
62 breeching. In relation to the boilers the breeching was to the
side and above. I cannot tell exactly whether Tyrrell was on the side or on top, he was either at the side or top. The conduits and pipe or pipes, in regard to which I asked Tyrrell when I spoke to him about the odor of gas, were in the angle between the wall and the ceiling. They were exposed to view. Then the explosion occurred, I was on my way out to the corridor, on my way to the janitor to have him turn the gas off. My recollection is, that on going out I told Tyrrell that I was going to have the janitor turn the gas off. The contractor's man or employé to whom I reported the odor of gas brought to my notice previous to the accident was a Mr. Wallace. I don't remember whether it was on Friday afternoon or Saturday morning. I reported the odor of gas to Mr. Gormley on Saturday morning. My recollection is that the accident happened about two o'clock in the afternoon. During Friday, when the odor of gas was noticeable in the assembly room over the boiler-room, I assisted the janitor in trying to locate the source of the odor in the assembly hall, thinking there was where the leak was. I made no efforts to locate the odor in the boiler-room, other than asking Tyrrell if he could discover any odor along the pipings or conduits. I assisted Mr. Tyrrell over to the drug store opposite the building and helped dress the abrasion on his forehead and sent for a little brandy which he took. Forsberg's automobile came and took him home.

On cross-examination witness testified:

I was first employed by the District in September, 1909; my duties as inspector of municipal buildings were to see that the provisions of the specifications were carried out. I was designated as inspector of this particular job of construction at McKinley School about December 26, 1910; that there was a superintendent of inspectors on all jobs, but he was not located in said building; said superintendent of inspectors would visit said buildings sometimes once a day and sometimes less frequently; that my hours of work on this particular

building were from the time operations were commenced in the morning until they ceased, and I was under the direction of the superintendent of inspectors and the Municipal Architect; that I never inspected the gas pipes in the boiler-room; that the part of the building in which Tyrrell was working was the second addition which at that time had been erected about six years; that I first learned of the presence of gas in said assembly room about 8 o'clock in the morning of the day previous to the explosion, from the janitor, Maddox. After I obtained information that there was a leak of gas in the building, my recollection is I did not report the fact to the District Repair Shop. Professor Daniel never informed me that gas was escaping under the floor of the assembly room; does not remember whether Maddox spoke to me about the escaping gas beneath the floor of the assembly room on Thursday prior to the accident that after endeavoring to find the leak of gas without *without* success I asked Tyrrell if he detected any odor of gas; this was somewhere between 9 and 11 o'clock on Saturday morning; that Tyrrell
63 had several colored men helping him, and if any of them complained on Friday before the accident about the odor of gas where they were working it did not come to my knowledge. Witness was asked if he made any report of escaping gas to any official of the District of Columbia when he first learned of said escaping gas, witness answered, "to this I cannot reply; I may have done so in my daily report, but I do not remember." The daily report was addressed to the Municipal Architect. The place where Tyrrell was working was very dark. I first learned of the escaping gas early Friday morning. I did not direct the janitor to turn off the gas, at this time, but on Saturday preceding the accident I looked for the janitor to have him turn off the gas, but it being Saturday the janitor was not to be found just at this time. This was just preceding the accident. I requested Tyrrell to find the leak of gas by asking him to smell along the pipes to see if he could detect the odor of gas, and my recollection is that Tyrrell did so, and replied that he could not detect it. This was in the for-noon of Saturday. I never went on top of the boiler; I understood that gas was of a highly explosive nature. I do not remember that Tyrrell complained to me on Friday about the presence of gas; may have requested Hechinger to try to find said leak, as he was employed by the Gormley-Poynton Company.

On redirect-examination witness testified, in substance that he has not been in the employ of the District of Columbia since June 1, 1912, and is in no manner interested in the result of this suit.

Whereupon, WILLIAM L. WEBSTER, sworn on behalf of the defendant, testified, in substance as follows:

I was chief inspector for the District of Columbia in the construction of the third addition to the McKinley Manual Training School building. I was supposed to visit the job daily. I was at the job two hours after the accident in this case happened. Prior to the explosion, I went over the building while the work was in progress; cannot say I did this every day but did it every time I visited the building. The District had a local inspector named German. It

was his duty to be at the work every day from the time they started work until they quit. The District was erecting a new building; and there were many modifications of the old building that were made necessary by the addition of the new building. We had to put in two new boilers. Of course that made many changes necessary in the boiler room, where this explosion took place. There are many pipes between the top of the boiler and the ceiling of the boiler room. I judge about four or five feet space is in there. I was on top of the boiler two hours after the accident happened, but was not there prior to the accident. I saw where the hole was blown in the ceiling. I took a ladder and got up on the boiler. The breeching was about 2½ to 3 feet distant from the top of the ceiling. A part of the pipe was encased in the *etrra* cotta and a part of it sunk below the terra cotta ceiling.

There was an elbow in said gas pipe which was cracked and there were several conduits, five or six, I don't know exactly how many,
64 that were hooked on to this pipe. Saw these pipes were hanging there two or three hours after the accident. Saw them before the accident, but not in the same position. There was a great deal of work done from day to day after I left the job that I do not know anything about. Before the accident, I did not see these pipes hanging there tied up on this gas pipe. The Carroll-Electric Company was doing the work there in connection with the pipes I saw hanging from the conduit. They had run the pipes through a partition wall between the boiler room and the room adjoining. I suppose they had protruded from that wall 10 or 12 feet, and they were supported on this gas pipe. They were not in the permanent position they were intended to occupy. They were put there temporarily during the installation.

On cross-examination, witness testified: Witness was asked to state where the cracked elbow in the gas pipe was, and he answered: These terra cotta arches are 12 inches deep, and on top of that arch after they are placed we put in a two inch cinder fill in which to imbed the timbers to which the finished floor is nailed. The elbow was broe*k*n right at the top of that arch, in the cinder fill.

I discovered it when I made an inspection, about 2 hours after the accident happened. It is impossible for me to state exactly how long the pipe had been broken. If the pipe had been broken before the gas would have been noticed throughout the building. The crack was right in the re-entrance of the angle of the elbow. That elbow was 4 or 5 feet to the smoke-box or breeching.

Whereupon HENRY R. THOMPSON, a witness sworn on behalf of the defendant, testified, in substance, as follows:

I am engineer at the McKinley Training School and have occupied that position ever since the school started, that is, 1902. I have charge of the mechanical department of the school. At the time of the explosion I was engineer there. I was in the engine room at the time *of* the explosion occurred, when Mr. Tyrrell was injured. I had been in the room, off and o*w*n, where Mr. Tyrrell was working. I do not recollect whether I had been in that room where he was

working on the day of the explosion. I do not recollect whether I detected any odor of gas in there at any time prior to the explosion. I had no special time to go in the room where Mr. Tyrrell was working. I would go in there a half dozen times a day or a dozen times a day. A gas pipe in the boiler-room where Mr. Tyrrell was working was located about 8 inches from the ceiling—practically over his head. It was near the corner of the room. There was breeching all along the gas pipe. One gas pipe and several water pipes were exposed. Prior to the accident, I saw no other pipes around that or attached in any way, or any other pipes or conduits or anything of that sort. At the time of the explosion I was about 30 or 35 feet from the boiler-room. I heard the explosion and went in there. There was a man on the ladder and I climbed up the boiler front to assist the man. I did not know what had happened at that
65 time. At that time you couldn't see anything but dust and pieces of terra cotta. Mr. Forsberg had been engaged to put in the breeching. Prior to the explosion, I did not see anything done by anyone in connection with this gas pipe which exploded. There were several electric conduits in the vicinity of that gas pipe. I do not remember whether or not any electric or other conduits were installed. I never examined the place before the explosion, but at the time of the explosion Mr. Tyrrell came down there and we assisted him into the engine room, and we wanted him to go to the hospital. I telephoned to the hospital for the ambulance. Prior to the time of the explosion, I did not see any pipes hanging from the ceiling, attached by a rope to anything. I do not know anything about anybody jacking up any pipes or conduits there prior to the explosion.

No cross-examination.

Whereupon JOHN P. CHAMBERLAIN, a witness sworn on behalf of the defendant, testified, in substance, as follows:

In September, 1911, I was engaged in erecting engines in the McKinley Training School building, and was there at the time of the explosion in which Mr. Tyrrell was injured. I had been there the entire summer, from the time school let out in June. I was not down in the boiler-room where Mr. Tyrrell was working on the breeching much of the time. I had gone down there but I had never worked in there. I do not remember how often I went in there before this explosion took place. I was not there every day prior to the explosion. When I went in there I never smelled any gas. I know there was six conduits that lead to the old switchboard, before the engine room was moved, they ran down behind the boiler, between the boiler and the walls. The gas pipes that exploded, ran within a foot below it—they were on top—they were supported by an air shaft. The conduits were old ones. I don't know anything about any that were put in there at that time, or any electric conduits, or anything of that kind. Before this explosion, I did not see anything attached to this gas pipe which exploded. I saw nothing hanging from a rope in that room prior to the explosion. I did not see that any jack was used there prior to the explosion, in connection with the conduits.

Whereupon, the following occurred:

Mr. Marshall: If the Court please, that is our case. We have not further testimony. I would like to submit some instructions.

With your Honor's permission, I want to make a formal offer of proof under the general issue of the facts set out in this plea which your Honor has declined to admit, and of the fact that the plaintiff in this case, as the record already shows, is administratrix, and that she made this settlement and that there was an order of court passed in that administration cause authorizing her to compromise and settle that claim for the death of her husband with these individuals.

Counsel for the defendant, the District of Columbia, did not exhibit to the court or to counsel for the plaintiff any paper
66 writing of any kind purporting to constitute a release by the plaintiff in this case, either in support of his proffer, or otherwise.

The Court having sustained a demurrer to the second plea of defendant filed in the case, thereupon sustained an objection by plaintiff to the proffer as announced by counsel for the defendant, to which ruling counsel for the defendant noted an exception and the same was noted on the minutes of the court.

The foregoing being the substance of all the testimony herein relevant to defendant's exceptions, defendant rested.

Whereupon counsel for defendant prayed the Court to instruct the jury as follows:

I. The jury are instructed that upon all of the evidence they must return a verdict in favor of the defendant.

II. The court instructs the jury to return a verdict for the defendant because of the absence of sufficient legal evidence of negligence of defendant which occasioned the death of plaintiff's intestate.

III. The Court instructs the jury that their verdict must be for the defendant because of the contributory negligence of the plaintiff's intestate.

IV. If the jury finds from the evidence that plaintiff's intestate was instructed not to, or warned against endeavoring to detect the leak of gas alleged in the declaration, with any lighted substance, and that plaintiff's intestate disregarded said instruction or warning, and that his said neglect contributed to his injuries and death, then their verdict must be for defendant.

V. The jury are instructed that if they find from the evidence that plaintiff's intestate, prior to the explosion of gas, had knowledge that gas was escaping or leaking as alleged in the declaration, and endeavored to find said leak in the manner referred to in the preceding instruction, then their verdict must be for defendant.

VI. The jury are instructed that in considering the question of contributory negligence they are not confined to the evidence offered on behalf of the defendant, and if the existence of any negligence on the part of the plaintiff's intestate which contributed to the accident, appears in the plaintiff's evidence or from the testimony of the plaintiff's witnesses, then the plaintiff is not entitled to recover.

VII. The jury are instructed that no presumption of negligence can arise against the defendant from the mere fact that the accident

happened, but the burden of proof is on the plaintiff to establish negligence on the part of the defendant.

(The Court: The degree of proof is wrongly stated. Negligence must be proved only by a preponderance of evidence.)

VIII. The jury are instructed that if they find from the evidence that neither plaintiff's intestate nor the defendant were guilty of negligence then their verdict must be for the defendant.

(Granted.)

IX. The jury are instructed that their verdict must be based solely upon the evidence; that their sympathy for the plaintiff should have no effect on their verdict; that the burden of proof is upon the plaintiff to establish by preponderance of evidence that the
67 injury to plaintiff's intestate proximately resulted from the negligence of the defendant. (Refused for use of word "establish.")

X. The jury are instructed that the declaration or typewritten statement of the plaintiff's case has no probative force, and that any verdict which the jury may render should be based solely on the testimony given from the witness stand without reference to the contents of said declaration.

(Granted.)

XI. The jury are instructed that they must return a verdict in favor of the defendant because in the erection or alteration of a public school building the defendant was exercising a governmental function.

XII. The jury are instructed that there can be no allowance of damages on account of injury to the feelings of the relatives of decedent, or on account of any affection they may have for said decedent or decedent may have had for such relatives, or on account of any suffering, physical or mental, of the decedent or his relatives. The recovery, if any, must be solely for the pecuniary injury sustained by the relatives of said decedent to be determined by what they would have received or what it may be reasonably expected they would have received from decedent but for his death or what it may be reasonably concluded said relatives were deprived of by the death of said decedent and the evidence must furnish the jury with some substantial tangible guide by which they can determine what pecuniary loss, if any, the plaintiff has sustained, and no damages are to be allowed plaintiff against the defendant by way of punishment.

(Granted.)

XIII. If the jury find from the evidence that the injury to the plaintiff's intestate was caused by the act or neglect of a fellow-servant, then their verdict must be for the defendant.

XIV. If the jury find from the evidence that plaintiff's intestate neglected to secure proper medical attention to his injuries as set forth in the declaration, and that if he had secured such medical attention, he might have survived said injuries, then they are instructed to return a verdict for the defendant.

XV. The jury are instructed to return a verdict for the defendant because plaintiff's intestate, at the time of the injuries to him as alleged in the declaration, was in the employ of an independent contractor.

And thereupon counsel for the defendant orally moved the Court to instruct the jury that as a matter of law the facts herein did not constitute a nuisance.

And thereupon the Court granted the eighth, tenth and twel-th instructions of defendant but refused to instruct the jury as prayed in the first, second, third, fourth, fifth, seventh, ninth, eleventh, thirteenth, fourteenth and fifteenth of said instructions, and also refused the oral motion of counsel for defendant to instruct the jury that the facts as proven did not constitute a nuisance, to which rulings of the Court upon each of said instructions and said
68 oral motion, counsel for defendant then and there separately noted exceptions which were duly allowed and noted upon the minutes of the Court.

During the consideration by the Court of the instructions submitted by counsel for defendant, the following occurred:

The Court: I suppose you mean what you say, Mr. Marshall, when you adopt these words (referring to the measure of proof set forth in prayers submitted by defendant); that you want the Court to tell the jury that the burden of proof is upon the plaintiff to "establish" by the preponderance of the evidence?

Mr. Marshall: Yes, sir, I think that is correct.

The Court: Well, that is not a correct rule of proof, and the instruction is refused on that ground.

Mr. Marshall: The use of the word "establish" I take it is not proper in that instruction. Will your Honor modify it?

The Court: No, I will not modify it. You may modify it if you want to.

And thereupon the Court charged the jury as follows:

"Gentlemen of the jury, in this case for a mere act of isolated negligence the municipality of the District of Columbia would not be responsible, no matter what the result of the isolated act of negligence was. The District in this action, if responsible at all, can only be responsible upon the theory that the death of Mr. Tyrrell resulted from the maintenance of a nuisance, in the first place, and secondly that the District of Columbia maintained the nuisance. Therefore you have to understand what a nuisance is, and after that you will have to understand the criteria which determine whether there was a nuisance in this case which makes the District responsible for maintaining it.

I perhaps by something in the nature of an illustration had better convey to your minds the significance — the legal term "nuisance," and I might begin by saying that the great entity of the public has some rights that no mere individual alone can claim are personal to him, except that he gets them by reason of the fact that he is one of the public. For illustration, the public has the right that the public air which the public relies upon to breathe shall not be rendered impure by noxious vapors or gases. It has the right that the public health shall not be affected by anything that renders the public air impure to be breathed. It has the right that the general safety of the public, the public life, shall not be endangered by the putting abroad of any substance which in itself is a menace to the safety of public life.

There may be a single, isolated act of negligence, which while it might momentarily interefere with the rights of the public would not amount to a nuisance. For illustration, if anyone should propel a vehicle down a thickly used thoroughfare belonging to the public, at such rate of speed as to imperil the safety of the public who were on that street, that would be an act of negligence which interfered with the right of public safety, but it would not be a nuisance, because it was a single, isolated act, which only for the instant, and not continuously, violated the right of the public. The signifi-
69 cance of the term "nuisance" lies in the consideration that nothing can be a nuisance unless it produces a continuity in the violation of the right of the public. That is the distinction which differentiates a wrong which amounts to a nuisance from a wrong which is merely a single act of negligence, and is not a nuisance, because it is only temporary and not continuous.

Therefore you first have to determine in this case whether or not the escape of gas amounted to a nuisance, and you would determine that by considering the nature of the locality, the degree of population there, the extent to which the public was in contact, whether remotely or closely, with the very location and locality, and whether or not, considering the escape of gas, both with respect to the time during which the escape had continued and the amount of gas that escaped during that time, all taken together there is shown to have been a continuance, a continuing violation, of a public right, either to the purity of the public air, or violation of the right of public safety; which, by reason of continuity of the violation of the right, amounted to a nuisance. No court can tell you how much time of continuity of the escape of gas would be necessary to constitute a nuisance. That is a thing for you to decide according to the details of the particular case, depending largely upon the determination in the particular case to what extent, if at all, the safety or health of the public is menaced, and the continuity of time that that may involve. If, therefore, you should find in this case, according to those criteria, that there was a nuisance in the escape of this gas, you will have to proceed, second, to determine whether the District is responsible for that nuisance.

Illuminating gas is a dangerous substance, and it is the law that whoever is in control of a dangerous substance is under a certain duty to keep it in control and not to permit it to escape. The measure of that duity may generally be stated to be that the custodian or user of such a dangerous substance is under the duty to use such care to control and confine it as one of reasonable caution and prudence would use under all the circumstances.

What is reasonable care in one case might not be reasonable care in another case; because what might be reasonable with respect to one substance might not be reasonable respecting another substance. Therefore, the degree of care which amounts to reasonable care, you see, depends on the nature of the substance and the liability of its escape.

Therefore, if you find that there was a nuisance in this case, and you find that the District of Columbia did not use that degree of care that a man of reasonable care and prudence would have used

under the same circumstances to keep this gas in the gas pipe, then the District of Columbia would be responsible for the maintenance of the nuisance. But in no other aspect of the case is it possible for a recovery to be properly had against the District of Columbia.

If you find, therefore, that there was a nuisance, and that the District was responsible for it, your next consideration is the amount appropriate to be awarded to the plaintiff by way of a verdict.

70 The action for wrongful death does not exist unless a statute authorizes it. There is a statute which permits a recovery for wrongful death in the District of Columbia, and which limits the amount to be recovered in any case to $10,000, and also limits the elements which are to be considered by the jury in the ascertainment of the sum proper for compensation under the law.

The statute here limits the elements for you to consider to the financial loss that is sustained by the next of kin of the deceased; that is, Mrs. Tyrrell and her child; the idea of the statute being that to the extent to which they have sustained a financial, pecuniary loss, through the death of Mr. Tyrrell, they should be compensated for it. But for no other element than pecuniary loss can they be compensated under this act. It is as bearing upon the question of what pecuniary advantage Mr. Tyrrell probably would have produced to his wife and child, that you were permitted to hear testimony concerning the age and health of Mrs. Tyrrell and the child, and the age and health of Mr. Tyrrell, so that you could judge from that, as well as might be, how long probably the child and Mrs. Tyrrell would have been receiving pecuniary advantage from him; how long he would probably have lived in order to supply that pecuniary advantage; and simply as aiding you on that same proposition of how much pecuniary advantage he probably would have brought to his wife and family if the accident had not occurred, you were permitted to hear what he was earning. In other words, you are permitted to have that element in evidence as showing what was his productive power or earning power at the time of his death. Having those things in mind, the case is submitted to you."

Whereupon counsel for defendant renewed the exceptions noted to the Court's refusal of certain prayers for defendant, and stated:

"I desire to except to the portion of your Honor's instruction in which you stated that the District of Columbia could be held responsible for the death of Mr. Tyrrell from a nuisance, under the facts in this case, and, of course, that as presented in this case the question of whether or not there was a nuisance there is question of fact to be determined by the jury; and further upon that point, I except to that part of your Honor's instruction in which you said that it was the duty of the District of Columbia to use a reasonable degree of care in connection with these gas pipes maintained on those premises."

The Court: "I understood it to be conceded that these gas pipes were under the control of the District. Was it not?"

Counsel for Defendant: "No, sir."

The Court: "That they paid the gas bills."

Counsel for Defendant: "They paid the bills, but the entire premises was under the control of the Board of Education. The District pays a great many bills for various governmental matters."

The Court: "Just a moment, gentlemen. I put the matter in that form because I understood it to be conceded that the District had control of the building, and therefore of the gas pipes. I apparently misapprehended counsel in that respect, and therefore I 71–96 leave it to you, gentlemen of the jury, as a question of fact to determine whether or not the District of Columbia was in the control of the gas in the pipes of the building."

Counsel for Defendant: "On that point your Honor will also allow me an exception."

The Court: "Yes."

Counsel for Defendant: "On the ground that the law gives the control to the Board of Education."

The foregoing exceptions to the charge of the Court were then and there duly allowed and noted.

After the noting of all of the exceptions hereinbefore set forth, and the making of the same a part of the record, which is also made a part hereof, and because the matters and things hereinbefore recited are not matters of record, and in order that defendant may have this case reviewed on appeal in the Court of Appeals of the District of Columbia, the defendant, by its attorneys, moves the court to sign and seal this, its bill of exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, to the granting of which motion, the plaintiff, by her counsel, prior to the signing and sealing of the same, interposed objection to the court upon the ground that the court has no jurisdiction so to do for the reason that defendant's bill of exceptions was submitted to the court one day too late, namely, on August 20, 1913—that the order passed in this cause on July 9, 1913, extended the time to submit said bill of exceptions and file transcript of record to August 20, 1913, but the court overruled said objection and counsel for plaintiff thereupon noted an exception to said ruling of the court, which exception is hereby allowed, and the motion of the defendant is hereby granted.

And thereupon, the court signs and seals this, the defendant's bill of exceptions, this 3d day of September, 1913, now for then.

DAN THEW WRIGHT, *Justice.* [SEAL.]

[Endorsed:] At Law. No. 54,691. Susie A. Tyrrell, Admrx. of the Estate of Conrad E. Tyrrell, Deceased, vs. District of Columbia, a Municipal Corporation. Bill of Exceptions. Filed Sep. 3, 1913. J. R. Young, Clerk.

[Endorsed:] No. 2600. District of Columbia, &c., Appellant, vs. Susie A. Tyrrell, &c. Addition to Record. Court of Appeals, District of Columbia. Filed Nov. 25, 1913. Henry W. Hodges, Clerk.

97 THURSDAY, January 8th, A. D. 1914.

No. 2600.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased.

The argument in the above entitled cause was commenced by Mr. R. J. Whiteford, attorney for the appellant, and was continued by Messrs. L. H. David and Alex. Wolf, attorneys for the appellee, and was concluded by Mr. C. H. Syme, attorney for the appellant.

98 No. 2600.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased.

(*Opinion.*)

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

This is an appeal by the District of Columbia from a judgment recovered by the appellee who, as plaintiff below, brought the action to recover damages of the defendant for injuries resulting in the death of Conrad E. Tyrrell, whose administratrix she is. Intestate died leaving a widow (the plaintiff), and an infant son 4 years of age.

The declaration alleges that the defendant was seized and possessed of a certain lot in the city of Washington on which it had a building known as the McKinley Manual Training school. That in December, 1910, defendant contracted with Gormley & Poynton to construct an addition to the said school building. That with the approval of the defendant said contractors sublet to one Forsberg a certain portion of the work which consisted of the installation of certain breeching and a smoke box over a furnace and boilers in the basement of the old building. That prior to said work of repair and at the time thereof the building, as defendant well knew, was supplied with illuminating gas for the service of which defendant paid the Washington Gas Light Company. That said gas was highly inflammable, and was conveyed through pipes from a gas meter
99 located in the basement of the building. That it was the duty of defendant to maintain the gas pipes in such manner as to prevent injury to persons lawfully in said building. That on September 1st and 2d, 1911, defendant had due notice that the gas pipes were in bad repair and that gas was escaping into the basement and other parts of said building. That defendant disregarding said notice wrongfully and negligently permitted said pipes

to remain in said dangerous condition and failed to have the same examined and repaired, and to stop the escape of gas. That on September 2, 1911, plaintiff's intestate was engaged in working in said basement for said Forsberg; and without any negligence on his part there occurred an explosion, as a direct result of defendant's negligence, by reason of which plaintiff's intestate received injuries which caused his death.

Defendant pleaded the general issue, and a special plea of release as follows:

"And for a further plea to each and every count of said declaration, the defendant, by leave of court, says that the plaintiff, as administratrix of above-named intestate, on, to wit, January 17, 1912, pursuant to an order of this court, executed a release for a valuable consideration and under seal to Philip F. Gormley and Arthur M. Poynton, who were the contractors with defendant, as alleged in the declaration, and to G. W. Forsberg, named in said declaration, and to certain others named in said release, whereby plaintiff released and forever discharged said persons of and from any and all claims, demands, suits, actions, and causes of action whatsoever, which the plaintiff, as administratrix aforesaid, had or might have against any or all of said parties by reason of the death caused by accident or otherwise of plaintiff's intestate, Conrad E. Tyrrell, while employed at, in and about work at the McKinley Manual Training School, located at 7th Street and Rhode Island Avenue N. W., Washington, D. C., which death was the result of an accident occurring at said McKinley Manual Training School on or about the 2d day of September, A. D. 1911."

Plaintiff demurred to the special plea and the same was stricken out, to which defendant excepted.

Testimony tended to show that the title to the school premises was in the defendant. That on December 23, 1910, defendant, in accordance with an appropriation by Congress and the directions of the same, entered into a written contract with Gormley-Poynton Company to build the annex to the building and also to install new steam boilers, smoke breeching, stack and box, etc., in the old building. The contract provided that the contractor should employ capable and skilled superintendent, foreman, and mechanics, who should obey orders from the Engineer Commissioner. That inspectors may be appointed who shall at all times have access to all parts of the work, and whose duty it shall be to point out to the contractors any neglect or disregard of the specifications of the contract. That the contractor shall be responsible for the care of the building and materials, and for all damage that may accrue to the same as well as to persons employed in said building. The contract was performed as required by law under the general supervision of the municipal architect, and one German was the inspector in immediate charge. The latter was there daily inspecting the work of the contractor. The Evans-Almoral Company subcontracted for the work in the furnace room, and let the same to Forsberg. Forsberg testified that he was engaged in installing the boilers and the smoke breeching. The breeching came off the top of the boilers close to the ceiling and into the smokestack. Had nothing to do with gas

pipes. Was usually in the room once a day and would go on to the top of the boilers where Tyrrell was working. Never smelled the odor of gas. There were some pipes within six inches of where the work was going on. Did not know what kind of pipes. There was testimony that Tyrrell had been in the employ of Forsberg, off and on, for five years, and received $2.50 per day with allowance for extra work. Tyrrell was foreman. Datcher, Green, and Moore were his helpers. Moore testified that on Saturday, September 2, 1911, he and the others were at work in the building. Witness was downstairs holding a sheet of iron. Tyrrell called Datcher to bring him a match. Neither Datcher nor witness had a match. He said "bring me a piece of paper." Witness twisted a piece of paper and gave it to him. Tyrrell said the superintendent told him to look for a leak in the gas pipe. An explosion followed and the whole thing toppled down on him. Pulled him out. Spoke to him about the escaping gas on Thursday. Told him at lunch time if he did not say something about the gas he would not be able to stay there until 4 o'clock. We worked all day Friday. Escape of gas was severe on Friday. It was about 12.30 when Tyrrell came to look for the leak. He was lying on his stomach on the breeching and there was a space between the boilers where he tried to find the leak. All could smell gas plainly in the boiler room; was very strong on Saturday. When we worked the first week, there was no smell of gas. Pipes were exposed about three feet from where Tyrrell was working. Commenced work again on Wednesday before the accident and them smelled gas.

Datcher, another witness for plaintiff, told Inspector German on Friday that the gas was escaping badly and he could not work there. Spoke to him again on Saturday. He made no answer either time. On Saturday at 12.30 Tyrrell said "you and Green stay down here and finish punching the holes in the iron, and Moore, you come up here with me." He and Moore went up the ladder on to the boilers. He came back and called for a match. There was no match, and he called for a piece of paper. Moore went up the ladder and handed him the paper, and Tyrrell went to work again. Had a lantern in his hand. Shortly after the explosion occurred. It was dark on top of the boilers where Tyrrell worked, but light below in the room. The odor of gas was more perceptible up above where Tyrrell was working.

The principal of the school testified for plaintiff. It was the vacation season. Noticed the smell of gas in the assembly room over the place where the explosion occurred. This was about the last week in August. Asked the janitor to locate the leak if he could. Mentioned it to Mr. Chamberlain, who is supervisor of manual training in the public schools. They and the janitor tried to locate the leak, but failed. Janitor continued to hunt the leak, but witness did not. The gas used in the building was for laboratory use; not for lighting.

100 Chamberlain testified that he had been supervisor of manual training for twenty years, with office in the Franklin Building. Had occasion sometimes daily and sometimes three times

a week to visit the McKinley School, having "a sort of supervisory work in the construction of the building for the Board of Education." Saw German there on his visits. Was in the building about an hour before the explosion and noticed the odor of gas. Could not tell where it came from; was strongest in the assembly hall.

Maddox, the janitor of the school building, had held his position about twelve years, and testified that on Thursday before the explosion the principal called witness' attention to the odor of gas; went into the assembly hall to see if it could be found; could not find the leak. Spoke to German of it. He made no reply. Told Gormley of the leak about the same time. Made no report other than to tell German because it was contract work. He makes his reports to the principal who makes them to the board and they notify the repair shop, and the repair shop sends some one to fix the leak. It was conceded that the gas in the building is used for public purposes and the bills therefor paid by the District of Columbia.

Hechinger, witness for plaintiff, was engineer and assistant superintendent for Gormley-Poynton Company. Remembers going through the building with German looking for the gas; can not say how long before. Think we smelled gas in the assembly room; do not remember about the boiler room.

An expert actuary testified that the expectation of a man 27 years old in good health would be 37.4 years. He also testified that the expectation of a woman 23 years old would be 48.7 years, and of a child of 4 nearly 50 years. Defendant objected to the evidence of the expectation of life of the woman and child and excepted when overruled. The testimony relating to Tyrrell's wounds and death is omitted.

For defendant, German testified by deposition that he was inspector of buildings under the municipal architect and was so employed in the McKinley School. A gas leak was reported to witness by the janitor. After attempting to locate it, without success, asked Tyrrell if he detected the odor of gas among the piping overhead where he worked. Said he did not. Cautioned him not to proceed until the leak had been discovered. Also reported it to Gormly and the contractor's superintendent. When the explosion occurred was on the way to tell the janitor to turn the gas off. Told Tyrrell I was going to have it turned off. Odor was noticeable in assembly room on Friday; helped the janitor to locate the source, thinking it was in that room. Made no effort to locate it in the boiler room other than to ask Tyrrell if he could discover any odor along the piping or conduits. This was on Saturday just preceding the accident. Some other testimony of no material consequence was introduced by defendant. The following recital concluded defendant's case:

"With your honor's permission, I want to make a formal offer of proof under the general issue of the facts set out in this plea which your honor has declined to admit, and of the fact that the plaintiff in this case, as the record already shows, is administratrix, and that she made this settlement and that there was an order of court passed in that administration cause authorizing her to compromise and settle that claim for the death of her husband with these individuals.

"Counsel for the defendant, the District of Columbia, did not exhibit to the court or to counsel for the plaintiff any paper writing of any kind purporting to constitute a release by the plaintiff in this case, either in support of his proffer or otherwise.

"The court having sustained a demurrer to the second plea of defendant filed in the case, thereupon sustained an objection by plaintiff to the proffer as announced by counsel for the defendant, to which ruling counsel for the defendant noted an exception and the same was noted on the minutes of the court."

Many special instructions asked by the defendant were refused, and defendant excepted. Several of these directed a verdict because of the absence of sufficient legal evidence, because of the contributory negligence of the plaintiff's intestate, because in the erection or alteration of a school building defendant was exercising a governmental function, and because the plaintiff's intestate was in the employ of an independent contractor. The last instruction asked was to the effect that as matter of law the facts proved did not constitute a nuisance.

The court then charged the jury that for an isolated act of negligence the defendant would not be responsible. If responsible at all it is upon the theory that the defendant maintained a nuisance from which the injury and death resulted. The public has the right that the air shall not be rendered impure by noxious gases; that the safety of the public shall not be endangered by the putting abroad of any substance which in itself is a menace to the public safety. The significance of the term nuisance lies in the consideration that nothing can be a nuisance unless it produces continuity in the violation of the right of the public. That the jury must determine from all the facts and conditions of locality whether there was such continuity of the escape of gas as amounted to a nuisance, and whether the defendant is responsible for such nuisance. Illuminating gas is a dangerous substance, and it is a rule of law that whoever is in control of a dangerous substance is under a certain duty to keep it in control and not permit it to escape. The measure of duty of the custodian or user of such dangerous substance is the care to control and confine it that one of reasonable caution and prudence would use under the circumstances. The charge on this point concludes as follows:

"Therefore, if you find that there was a nuisance in this case, and you find that the District of Columbia did not use that degree of care that a man of reasonable care and prudence would have used under the same circumstances to keep this gas in the gas pipe, then the District of Columbia would be responsible for the maintenance of the nuisance. But in no other aspect of the case is it possible for a recovery to be properly had against the District of Columbia."

Defendant excepted to the charge relating to nuisance and its liability therefor.

The District of Columbia is undoubtedly a municipal corporation,
though its organization is peculiar. There is no general or-
101 ganic law governing all of the ordinary powers usually conferred in the creation of a municipal corporation—no formal municipal charter, so to speak. The Commissioners are ministerial

officers. Congress exercises general control, sometimes enacting laws relating to municipal powers, duties and regulations; sometimes delegating to the Commissioners the power to enact police regulations respecting specified subjects. The Commissioners have no power to raise revenues for the support of the municipality, and the sums appropriated by Congress are directed to be applied to certain specified purposes, whether it be the improvement of streets, erection of public buildings, including public school houses and their repair. Brown v. D. C., 29 App. D. C., 273, 282. The management and control of the public schools were formerly vested in the Commissioners, and the title to the premises had been vested in the District of Columbia. The act of Congress, approved June 20, 1906 (34 Stat., 316), undertakes to provide for the system of education, under a new arrangement. It vests control of the public schools in a Board of Education, to be appointed by the Supreme Court of the District; which board shall determine all questions of public policy relating to the public schools, appoint the executive officers, define their duties, and direct expenditures. It shall also make an estimate in detail for the amount of money required for the schools for the coming year, and the Commissioners shall transmit the same in their annual estimate of appropriations for the District. The public schools form a branch of the municipal organization and it would seem to be immaterial how the Board of Education, charged with their administration and control, are chosen or appointed. Barnes v. D. C., 91 U. S., 540, 545; D. C. v. Woodbury, 136 U. S,. 450, 453.

If through the negligence or misconduct of the Board of Education an injury is done to person or property for which an action would lie in a particular case, that action would lie against the District of Columbia as a municipal corporation. This brings us to the question whether this action can be maintained against the District of Columbia for the consequences of the negligence or misconduct of its agents, as charged.

The court, as recited above, charged the jury that the defendant was not responsible for a mere act of negligence. This, we think, delares a sound principle of law. "Municipal corporations in general are invested with two kinds of special powers, and charged with two kinds of duties; the one kind is private, that is to say, merely municipal and for special local purposes and benefits; the other of a political or governmental character, for the general public welfare. 2 Dillon, Municipal Corporations, sec. 966. In the language of Folger, J.: 'One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is as a sovereign. * * * The former is not held by the municipality as one of the political divisions of the state; the latter is.' Maximilian v. New York, 62 N. Y., 160, 164." Brown v. D. C., 29 App. D. C., 273, 282.

Whatever the conflict of decisions upon the question of the liability of a municipal corporation for defects in the public streets, that lia-

bility has been affirmed in this jurisdiction. Barnes v. D. C., 91 U. S., 540; D. C. v. Woodbury, 136 U. S., 450.

The ground of liability is thus stated in Weightman v. Corporation of Washington (1 Black, 39, 50): "Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of their charter." The duty was a ministerial one.

The Supreme Court of the United States has gone no further than this.

In no case has it declared liability for failure to perform a purely governmental duty. See Johnston v. D. C., 118 U. S., 19, 21; Brown v. D. C., 29 App. D. C., 273, 282. In the latter case, the District was held not to be liable for a defective condition of a house of the fire department through which plaintiff was injured. The duty of maintaining a system of public education for the benefit of all persons residing in the District of Columbia is a purely governmental function which is exercised by act of Congress through a Board of Education established thereby, though using school buildings the title to which had been acquired by the District of Columbia at a time when the system was under the management of the District Commissioners by direction of Congress. "The duty of providing means of education, at the public expense, by building and maintaining school houses, employing teachers, etc., is a purely public duty, in the discharge of which the local body, as the state's representative, is exempt from corporate liability, for the faulty construction or want of repair of its school buildings, or the torts of its servants employed therein." Shearman and Redfield on Negligence (6th Ed.), sec. 267.

The foregoing proposition has the support of the great weight of authority. See 4 Dillon Municipal Corporations, sec. 1657, and notes; Hill v. Boston, 122 Mass., 344, 353, et seq. Folk v. Milwaukee, 108 Wis., 359; Kinneare v. Chicago, 171 Ill., 332.

The apparent purpose of the declaration was to claim damages for defects in the gas pipes of the school building and the neglect of the duty to repair the same after notice; but it may be assumed that it furnished a foundation for the recovery of damages caused by a nuisance maintained by the defendant.

Upon this assumption the court charged the jury that if the gas had been permitted to escape in the building long enough to constitute a continuing nuisance; and that if the defendant did not exercise the care that a man of reasonable prudence and care would have exercised under the same circumstances it would be responsible for the maintenance of the nuisance.

That the District of Columbia may be held liable for the commission of a nuisance working injury directly to the occupant of adjacent property has been affirmed by this court. Roth v. D. C., 16 D. C., 323, 327. In that case, a stable in which were kept the horses

used for ambulances by the District Police was kept in such
102 filthy condition that it produced flies and vermin and noxious odors which impaired the health and comfort of plaintiff who lived on the adjoining lot. It was held that while "the mere maintenance of a stable, although possibly annoying and inconvenient to the residents of a neighborhood, may not of itself be held to be a nuisance, since it is a necessary and proper appliance of governmental authority; but the negligent, improper, and unlawful manner of its maintenance, which is the thing of which complaint has been made, is not warranted by any requirement of governmental duty, and is, on the contrary, directly antagonistic to the demands of such duty." And it was further said: "It would be strange indeed if the question of the liability of a municipality for a nuisance committed or permitted by it upon its own property to the detriment of the neighborhood were dependent upon the amount of gain derived from the existence of the nuisance. As we have said, the municipality is not in the performance of any public duty but rather in the violation of its public duties, when it permits the maintenance of a nuisance upon its own property."

This conclusion is supported by many cases. See Hill v. Boston, 122 Mass., 344, 358, where the cases are cited. In that case the court held that the city was not liable for an injury to a school child through the unsafe condition of the school building. The cases cited, as referred to above, are by the same court. After stating their doctrines, Mr. Chief Justice Gray said: "But in such cases the cause of action is not neglect in the performance of a public duty, rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act, causing a direct injury to the property of another, outside of the limits of the public work."

In the instant case there was no wrongful act as a result of which the gas was permitted to escape and become a nuisance to the public outside of the building working discomfort or danger of itself.

It might be inferred from the evidence of the assistants of plaintiff's intestate that, failing to obtain the match that he asked for, he lighted the twisted paper with the light contained in his lantern, and in searching for the leak ignited the gas where confined in some of the recesses of the ceiling in quantity sufficient to produce the explosion that caused his death.

Be that as it may, his death was not the result of a nuisance for which the defendant could be held liable.

Instead of being governed therefore by Roth v. D. C., supra, and the Massachusetts nuisance cases referred to above, the case comes more nearly within the rule of Brown v. D. C., Hill v. Boston, and others, supra. In one of those cases (Folk v. Milwaukee, 108 Wis., 359) the action was for the death of a pupil caused by the escape of sewer gas in a school building.

We are of the opinion that the court should have directed a verdict for the defendant.

This conclusion renders it unnecessary to consider the assignments of error relating to the effect of the work as carried on by an

independent contractor, to contributory negligence, and to the effect of the release of the principal and subcontractors as pleaded.

The judgment is reversed with costs, and the cause remanded for a new trial, not inconsistent with this opinion.

Reversed.

Mr. Justice Robb dissenting.

103 MONDAY, February 2nd, A. D. 1914.

No. 2600, January Term, 1914.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed with costs; and that this cause be and the same is hereby remanded to the said Supreme Court for a new trial not inconsistent with the opinion of this Court.

Per MR. CHIEF JUSTICE SHEPARD,

Mr. Justice Robb dissenting.

February 2, 1914.

104 In the Court of Appeals of the District of Columbia.

No. 2600.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased, Appellee.

Motion.

To the end that any question as to the finality of the judgment of this Court in this case may be concluded without any further proceedings, expense, or delay, in this court or the court below, so that the appellee (plaintiff) may make application for the allowance of a writ of error in order that this case may be reviewed by the Supreme Court of the United States, the appellee, without prejudice to any of her rights in the premises, hereby insisting on the validity and correctness in all respects of the judgment in her favor obtained

by her in this cause in the trial court, namely, the Supreme Court of the District of Columbia, as shown by the record herein, and electing to stand upon said record, moves this court as follows:

(1) To recall the mandate of this Court, heretofore sent to the Supreme Court of the District of Columbia, in this cause.

(2) To amend the judgment of this Court in this cause by adding thereto a direction to the said Supreme Court of the District of Columbia to enter a judgment that the plaintiff take nothing by her writ and that the defendant, the District of Columbia, a municipal corporation, go thereof without day.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Appellee.

105 To Conrad H. Syme, Esq., Corporation Counsel, and R. J. Whiteford, Esq., Assistant Corporation Counsel, Attorneys for Appellant, District of Columbia, a Municipal Corporation:

The appellant will please take notice that the foregoing motion will be called to the attention of the Court of Appeals on Thursday, December 17th, 1914, at ten o'clock, a. m., or as soon thereafter as counsel can be heard.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Appellee.

We hereby acknowledge the service of a copy of the foregoing motion and notice, and hereby consent to the granting of the said motion, this 17 day of December, 1914.

CONRAD H. SYME,
ROGER J. WHITEFORD,
Attorneys for Appellant, District of Columbia, a Municipal Corporation.

(Endorsed:) In Court of Appeals, D. C. No. 2600. District of Columbia, a Municipal Corporation, v. Susie A. Tyrrell, Adm'r'x. Motion of appellee to recall mandate and amend judgment. Court of Appeals, District of Columbia. Filed Dec. 24, 1914. Henry W. Hodges, Clerk.

106 WEDNESDAY, December 24th, A. D. 1914.

No. 2600.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased.

On consideration of the motion to recall the mandate and to amend the judgment in the above entitled cause, It is by the Court this day ordered that said motion be and the same is hereby denied.

107 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 106 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of District of Columbia, a Municipal Corporation, Appellant, vs. Susie A. Tyrrell, as administratrix of the Estate of Conrad E. Tyrrell, deceased, No. 2600, October Term, 1914, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 26th day of December, A. D. 1914.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 12/26/14. H. W. H., Clerk.]

108 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Being informed that there is now pending before you a suit in which The District of Columbia is appellant, and Susie A. Tyrrell, as Administratrix of the estate of Conrad E. Tyrrell, deceased, is appellee, No. 2600, which suit was removed into the said Court of Appeals by virtue of an appeal from the Supreme Court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme

109 Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-seventh day of January, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] 2600. File No. 24,497. Supreme Court of the United States. No. 753, October Term, 1914. Susie A. Tyrrell, as Administratrix, etc., vs. The District of Columbia. Writ of Certiorari. Court of Appeals, District of Columbia. Filed Jan. 28, 1915. Henry W. Hodges, Clerk.

110 In the Court of Appeals of the District of Columbia.

No. 2600.

DISTRICT OF COLUMBIA, a Municipal Corporation, Appellant,
vs.
SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased, Appellee.

It is hereby stipulated by and between counsel for the respective parties, in the above entitled cause, that the certified transcript of record in the above entitled cause, already on file in the Supreme Court of the United States, in the case entitled Susie A. Tyrrell, As Administratrix of the Estate of Conrad E. Tyrrell, petitioner, against the District of Columbia, a municipal corporation, No. 753, October Term, 1914, which was filed therein as an exhibit to a petition by the said Susie A. Tyrrell, as Administratrix as aforesaid, against said District of Columbia, for the allowance of a writ of certiorari, shall be taken, deemed and considered by the Supreme Court of the United States, as the return to the writ of certiorari granted by the Supreme Court of the United States in said cause.

LEVI H. DAVID,
Attorney for Susie A. Tyrrell, Administratrix of the Estate of Conrad E. Tyrrell, in the Court of Appeals of the District of Columbia and Petitioner in Cause No. 753, October Term, 1914, in the Supreme Court of the United States.

ROGER J. WHITEFORD,
Assistant Corporation Counsel, Attorney for the District of Columbia, a Municipal Corporation, Appellant in the Court of Appeals and Respondent in said Cause in the Supreme Court of the United States.

Washington, D. C., January 28, 1915.

(Endorsed:) In Court of Appeals, D. C. No. 2600. District of Columbia, a Municipal Corporation, Appellant, vs. Susie A.
111 Tyrrell, as Adm'r'x, etc., appellee. Stipulation between counsel that transcript of record already on file in Supreme Court, U. S., be taken as return to writ of certiorari. Court of Appeals, District of Columbia. Filed Jan. 28, 1915. Henry W. Hodges, Clerk.

112 I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify, in obedience to the writ of certiorari hereto attached and returned herewith, the foregoing to be a true and correct copy of the stipulation of counsel filed in said cause on the 28th day of January, A. D. 1915.

In testimony whereof, I hereunto subscribe my name and affix

the seal of said Court at the City of Washington, District of Columbia, this 28th day of January, A. D. 1915.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 1/28/15. H. W. H., clerk.]

113 [Endorsed:] File No. 24,497. Supreme Court U. S. October term, 1914. Term No. 753. Susie A. Tyrrell, as Administrator etc., Petitioner, vs. The District of Columbia. Writ of certiorari and return. Filed January 29, 1915.

114 In the Supreme Court of the United States.

No. 316.

SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad A. Tyrrell, Deceased, Petitioner,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation, Respondent.

It is hereby stipulated by and between the counsel for the respective parties in the above entitled cause, that there shall be omitted by the clerk of the Supreme Court of the United States, from the transcript of the record to be printed in this cause for the determination on the merits of the issues involved in this cause, the following papers, now on file herein:

1. The matters and things contained in the transcript, filed in the Court of Appeals of the District of Columbia, on September 22, 1913, beginning with the words "In the Supreme Court of the District of Columbia" on page 16 thereof, to and including page 42 thereof.

2. Motions of appellee (Susie A. Tyrrell, adm'r'x) in said Court of Appeals, entitled "To strike out unauthenticated document purporting to be duplicate bill of exceptions; To dismiss appeal, or to affirm judgment—points and authorities—affidavits in sup-
115 port thereof," from pages 72 to 80, both inclusive.

3. Brief of appellant District of Columbia in said Court of Appeals, in opposition to foregoing motions of appellee, and affidavits, from page 81 to 85, both inclusive.

4. Brief of appellee, (Susie A. Tyrrell, adm'r'x) and affidavits filed in the Court of Appeals, from pages 86 to 93, both inclusive.

5. Minute entry of Court of Appeals of the District of Columbia, dated November 3, 1913, setting forth submission to the Court of Appeals of motion of appellee to strike out, etc., page 94.

6. Opinion of the Court of Appeals of the District of Columbia, on said motion to dismiss or affirm the judgment, on page 95.

7. Minute entry of said Court of Appeals, dated November 25, 1913, denying motion of appellee to dismiss, on page 96.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Petitioner, Susie A. Tyrrell, Administratrix of the Estate of Conrad E. Tyrrell, Deceased.
CONRAD H. SYME,
ROGER J. WHITEFORD,
Attorneys for Respondent, District of Columbia, a Municipal Corporation.

Washington, D. C., September 8, 1915.

116 [Endorsed:] 316-15. 24497. No. 316. In the Supreme Court of the United States. Susie A. Tyrrell, as Administratrix of the estate of Conrad E. Tyrrell, deceased, Petitioner, vs. District of Columbia, a municipal corporation, Respondent. Stipulation between counsel to omit the printing of certain parts of the record. Levi H. David, Attorney at Law, Commercial National Bank Bldg., Washington, D. C. Phone Main 400.

117 [Endorsed:] File No. 24,497. Supreme Court U. S. October term, 1915. Term No. 316. Susie A. Tyrrell, as Adm'x, etc., Petitioner, vs. District of Columbia. Stipulation to omit parts of record in printing. Filed September 9, 1915.

FILED
FEB 10 1916
JAMES D. MAHER
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. [redacted] 54

SUSIE A. TYRRELL, ADMINISTRATRIX,
PETITIONER,

vs.

DISTRICT OF COLUMBIA, RESPONDENT.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Petitioner.

SUBJECT-INDEX.

CITATIONS.

(See pages I-VI of brief in support of petition for certiorari.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 316.

SUSIE A. TYRRELL, ADMINISTRATRIX,
PETITIONER,

vs.

DISTRICT OF COLUMBIA, RESPONDENT.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER.

I.

Preliminary.

This case is fully covered by the petition for certiorari and the brief in support thereof. Therefore, in order to avoid duplication, we shall, with the court's approval, adopt the contents of that petition and brief as our substantive brief herein. The petitioner is called the plaintiff and the respondent the defendant.

II.

Statement of Case.

The facts of the case are stated at length on pages 1-14 of the brief in support of the petition for certiorari and are briefly restated in pages a-c of the petition.

III.

Opinion of Court.

The opinion of the Court of Appeals appears on pages 43-51 of the record, and our analysis of it is given on pages d-m of the petition for certiorari.

IV.

Specification of Error.

1. The court erred in holding that the defendant was engaged in performing a purely governmental function in installing additional boilers in the old school building and therefore was not liable for its tort which directly resulted in killing Tyrrell.

2. The court erred in holding that the defendant was in the exercise of a governmental duty in installing additional boilers in the old school building, and therefore was exempt from the consequences of its infliction of a positive wrong which directly resulted in killing Tyrrell.

3. The court erred in refusing to hold that the defendant, in installing additional boilers in the old school building, was in the exercise of a private, corporate, administrative, municipal function or duty, and therefore was liable for its tort which directly resulted in killing Tyrrell.

4. The court erred in refusing to hold that even if the defendant was in the exercise of a governmental duty in

installing additional boilers in the old school building, but was performing that duty under a statutory obligation imposed by Congress which did not relieve it from liability for its wrongful conduct, nevertheless it was liable for its tort which directly resulted in killing Tyrrell.

5. The court erred in holding that the defendant was guilty of no wrongful act as a result of which the gas was permitted to escape and become a nuisance.

6. The court erred in holding that Tyrrell's death was not the result of a nuisance for which the defendant could be held liable.

V.

Brief of Argument.

1. The first four specifications of errors are completely considered in the brief in support of the petition for certiorari, as follows:

(a)	Statutes relative to construction and repair of public school buildings as such	14-20
(b)	Defendant liable under statutes	20-21
(c)	Statutes relative to public school system as such	21-26
(e)	Defendant liable for negligence causing nuisance in escape of gas because in exercise of non-governmental function	58-82
(f)	Defendant not exempt from liability for infliction of positive wrong on Tyrrell even if in exercise of governmental function	82-111

2. The fifth and sixth specifications of errors are fully treated in that brief, as follows:

(d)	Defendant liable for nuisance in escape of gas regardless of negligence	26-58
(e)	Defendant liable for negligence causing nuisance in escape of gas because in exercise of non-governmental function	58-82

3. That brief also discusses in detail the other points presented by the record but not considered by the court of appeals, such as the effect of the work being carried on by an independent contractor (page 128, abandoned by defendant), contributory negligence (pages 129-130), and the effect of the release of the principal and subcontractors as pleaded (pages 111-128).

VI.

Conclusion.

We respectfully submit that the judgment of the Court of Appeals should be reversed and that of the Supreme Court of the District of Columbia affirmed, with costs.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Plaintiff.

Washington, D. C., February 19, 1916.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. [redacted]54

SUSIE A. TYRRELL, as administratrix of the Estate of Conrad E. Tyrrell, deceased, *Petitioner*,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT-INDEX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No.....

SUSIE A. TYRRELL, as administratrix of the Estate of Conrad E. Tyrrell, deceased, *Petitioner*,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of the above-named Susie A. Tyrrell as administratrix of Conrad E. Tyrell, deceased, respectfully represents as follows:

1. That she is a citizen of the United States, a resident of the District of Columbia, and files this petition as the

duly appointed and qualified administratrix of the estate of her husband, Conrad E. Tyrrell, lately a citizen of the United States and a resident of said District of Columbia.

2. That on, to wit: June 6, 1913, the petitioner, as such administratrix, obtained a judgment, in the sum of $7,000, against the respondent, the District of Columbia, a municipal corporation, in the Supreme Court of the District of Columbia, in an action for damages, for the wrongful death of the said Conrad E. Tyrrell, occasioned by an explosion of gas which occurred September 2, 1911, while plaintiff's intestate, a boiler-maker, was lawfully at work in the basement of the McKinley Manual Training School building, the real estate being owned and possessed, in fee simple, by, and in sole charge of, the defendant, at the time of the accident. The building is situated at the southeast corner of Seventh Street and Rhode Island Avenue, Northwest, in the city of Washington, District of Columbia, and at the time of the accident, during the vacation period of the school session, the respondent was having repairs made upon its property, namely, the construction of an addition to, and certain repairs in the McKinley Manual Training School (old) building, an appropriation having been made by Congress for improvements to the said school building.

3. That the declaration, in the first count, alleged that in December, 1910, the defendant the District of Columbia, respondent herein, contracted with Gormley & Poynton Company to construct the addition to the said school building; and also to install certain breeching and a smoke box over the furnace and boilers in the basement of the old school building; that prior to the said work of repair, and at the time thereof, the building, as the respondent (defendant) well knew, was supplied with illuminating gas, for the service of which the respondent paid the Washington Gas

Light Company; that said gas was highly inflammable, and was conveyed through pipes from the gas meter located in the basement of the old building; that it was the duty of the respondent (defendant) to maintain the gas pipes in such manner as to prevent injury to persons lawfully in said building; that on September first and second, 1911, prior to the accident, the respondent (defendant) had due notice that the gas pipes were in bad repair, and that gas was escaping into the basement and other parts of said building; that respondent (defendant), disregarding said notice, wrongfully and negligently permitted said pipes to remain in said dangerous condition, and failed to have the same examined and repaired, and to stop the escape of gas; that on September 2, 1911, plaintiff's intestate was lawfully in and upon said premises, and in the basement thereof, in the due course of his employment, and without any negligence upon the part of plaintiff's intestate, an explosion occurred, as a direct result of the defendant's negligence, by reason of which plaintiff's intestate received injuries which caused his death. (Trans. Rec., pp. 1-4.)

That an amendment to the declaration, adding another count, set forth that the respondent (defendant) was, by and through its agents, after due notice of the escape of the gas in the said school building, guilty of maintaining a nuisance. (Trans. Rec., pp. 5-10.)

That at the trial in the Supreme Court of the District of Columbia, the petitioner, as plaintiff, adduced testimony which fully sustained the allegations of her declaration, and the cause was submitted to the jury by the trial court, and the jury found a verdict in favor of the petitioner, in the sum of $7,000, upon which judgment was duly entered. (Trans. Rec., p. 12.)

(A brief summary of the evidence adduced at the trial is set forth in the Statement of the Case (pp. 1-14), in the

Brief for Petitioner, hereto annexed, with reference to the pages of the printed record.)

4. That the respondent herein appealed to the Court of Appeals of the District of Columbia and said appellate court, in its opinion, rendered February 2, 1914, which was written by Chief Justice Shepard, and concurred in by Associate Justice Van Orsdel, held *that municipal corporations in general are invested with two kinds of special power, and charged with two kinds of duties; that one is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; that the other is of that kind which arises or is implied from the use of political rights under the general law in the exercise of which it is a sovereign; that the former is not held by the municipality as one of the political divisions of the state, and the latter is,* following one of its previous decisions, namely, the case of Brown v. District of Columbia, 29 App. D. C., 273; that the Court of Appeals further held that the maintenance of schools is a governmental function, and the neglect of the District of Columbia to fix the leaking gas pipe in a school building, of which it had notice, does not render it liable for personal injuries caused by the explosion of the gas, upon the theory that the condition constituted an actionable nuisance. The said Court of Appeals concluded that there was no liability in this case and that the trial court should have directed a verdict in favor of the respondent, the District of Columbia, reversed the judgment in favor of the petitioner, and remanded the cause for a new trial, not inconsistent with its opinion, that is to say, in order that judgment might be entered in favor of the municipal corporation. (Trans. Rec., pp. 98-102.) Record Rec. 51

Justice Robb, the other member of the court, dissented,

but rendered no written opinion in the case. The decision is contained in the Transcript at pages 43-51. The case is reported in 41 App. D. C., 463, 476.

The decision of the Court of Appeals cites, quotes and relies upon the case of Hill v. City of Boston, 122 Mass., 358, and says that petitioner's case comes more nearly within the rule of the case decided by the Massachusetts court, which the Court of Appeals approves and follows, *instead of following the decisions of the Supreme Court of the United States, in the following cases, which were especially* called to the attention of the Court of Appeals, in petitioner's printed brief filed in that court, as well as on the oral argument of this cause before the court:

Weightman v. *Corporation of Washington*, 1 Black, 39 (1862); *Barnes* v. *District of Columbia*, 91 U. S., 540 (1876); *District of Columbia* v. *McElligott*, 117 U. S., 621 (1886); *Brown* v. *District of Columbia*, 127 U. S., 579 (1888); *Metropolitan Railroad* v. *District of Columbia*, 132 U. S., 1 (1889); *District of Columbia* v. *Woodbury*, 136 U. S., 450 (1890), and *Workman* v. *New York, Mayor, Aldermen and Commonalty*, 179 U. S., 552 (1900).

The decision in the case of Hill v. City of Boston, 122 Mass., 344 (decided March 6-12, 1877), which the Court of Appeals relies upon, as determining the doctrine of nonliability in the instant case, held that—

> "A child, attending a public schoolhouse provided by the city, under the duty imposed upon it by general laws, can not maintain an action against the city for an injury suffered by reason of the unsafe condition in a staircase in the schoolhouse, over which he is passing"

was rendered by Chief Justice Gray. The Massachusetts court analyzes the principles announced by this court in

Barnes v. District of Columbia, 91 U. S., 540 (1876), and refuses to follow it, saying, among other things, at page 372:

> "That decision, as far as it held the board of public works to be an agent of the corporation for whose act or neglect the corporation was responsible, is avowedly opposed to the decisions of this court in Thayer v. Boston, 19 Pick., 511, and in Walcott v. Swampscott, 1 Allen, 101, to which may be added Fisher v. Boston, 104 Mass., 87, 95, and other cases there referred to; and it would seem to be inconsistent with the judgment of the House of Lords in Duncan v. Findlater, 6 Cl. and Fin., 894, as explained in Mersey Docks v. Gibbs, L. R., 1 H. L., 116, 117, and with other decisions in England, already cited. * * * (P. 373.) If the decision of the Supreme Court, so far as it asserted the liability of a municipal corporation or board to private action for a defect in a highway or public work which it was authorized and required to construct and repair, had been placed, as in the case of Weightman v. Washington upon the ground that, in the opinion of the court, the terms of the special act creating the corporation showed that the obligation to repair was imposed by Congress upon the corporation in consideration of benefits conferred by the charter, we should, upon a question affecting a district of which the national legislature and judiciary have exclusive jurisdiction, readily defer to the decision.
>
> "But when that decision, approved by a bare majority of the court, and in a matter in which it is not binding upon us, as authority is based upon reasoning which does not command our assent, and which, if carried to its logical result, would impose upon every city in this commonwealth, new and indefinite liabilities, we can not avoid the duty of examining the precedents invoked in its support, and of deciding a case, which is within our final jurisdiction, according to our convictions of what the law demands."

In the *Barnes* case (91 U. S.) this court, at page 555, says:

> "No doubt there are authorities holding views not in all respects in harmony with those we have expressed. Among these are Thayer v. Boston, 19 Pick., 510; Walcott v. Swampscott, 1 Allen, 101; Child v. City of Boston, 4 *id.*, 41." * * *

The attention of the Court of Appeals was called to the fact, on page 102 of the brief of this petitioner, that the Massachusetts Court in Hill v. Boston expressly declined to follow the case of Barnes v. D. C. (91 U. S., 540.)

Chief Justice Gray, who wrote the opinion in the case of Hill v. City of Boston (122 Mass., 344) as Associate Justice of this court, wrote the dissenting opinion in the case of Workman v. New York City, Mayor, etc. (179 U. S., 574, 591.)

5. That the Court of Appeals in the instant case, reaffirms its decision in the case of Brown v. District of Columbia, 29 App. D. C., 273 (1907), in which latter case, on page 282, it adopts the views of Dillon on Municipal Corporations, section 966, ruling as follows:

> "Municipal corporations in general are invested with two kinds of special powers, and charged with two kinds of duties; the one kind is private, that is to say, merely municipal and for special local purposes and benefits; the other of a political or governmental character, for the general public welfare."

And accordingly, the Court of Appeals held, erroneously, it is respectfully submitted, and in conflict with the cases decided by this court, in the Brown case (29 App. D. C.), on page 284, as follows:

> "By the great weight of authority, the maintenance of a fire department is in the nature of a general public duty, as contra-distinguished from those duties purely municipal and local; and the employees thereof are not mere agents or servants of the municipality, but, rather, officers charged with a public service. In consequence it is held that the maxim, *Respondeat Superior*, has no application,"

citing Fisher v. Boston, 104 Mass., 87, among other *State* cases.

The said Court of Appeals, in the instant case, says, in its opinion (Trans. Rec., p. 101; 41 App. D. C., 473, 474):

> "The ground of liability is thus stated in Weightman v. Washington, 1 Black, 39, 50, 17 L. ed., 52, 57: 'Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter.' The duty was a ministerial one. The Supreme Court of the United States has gone no further than this. In no case has it declared liability for failure to perform a purely governmental duty."

6. Petitioner's brief, hereto annexed, is the same brief filed in the Court of Appeals in this case, and under the heading "(f) Defendant Not Exempt from Liability for Infliction of Positive Wrong on Tyrrell Even if in Exercise of Governmental Function" (*infra*, pp. 82-111), the *Weightman*, *Barnes*, *McElligott*, *Brown*, *Metropolitan Railroad Company*, *Woodbury* and *Workman* cases, decided by this court, are elaborately quoted.

The attention of the Court of Appeals was especially called to the following language of this Court in the *Workman* case (179 U. S., 552), contained on pp. 573-574 (petitioner's brief, *infra*, pp. 101-102).

"Because we conclude that the rule of the local law in the State of New York—conceding it to be as held by the Circuit Court of Appeals—does not control the maritime law, and therefore, affords no ground for sustaining the non-liability of the city of New York in the case at bar, we must not be understood as conceding the correctness of the doctrine by which a municipal corporation, as to the discharge of its administrative duties, is treated as having two distinct capacities, the one private or corporate, and the other governmental or sovereign, in which latter it may inflict a direct and positive wrong upon the person or property of a citizen without power in the courts to afford redress for such wrong. That question, from the aspect of both the common and municipal law, was considered by this court in *Weightman* v. *Corporation of Washington* (1861), 1 Black, 39; *Barnes* v. *District of Columbia* (1875), 91 U. S., 540; and in *District of Columbia* v. *Woodbury* (1890), 136 U. S., 480. And although this opinion is confined to the controlling effect of the admiralty law, we do not intend to intimate the belief that the common law which benignly above all considers the rights of the individual, yet gives its sanction to a principle which denies the duty of courts to protect the rights of the individual in a case where they have jurisdiction to do so. For these reasons we are sedulous to say that we must not be understood as in anywise doubting the correctness of the doctrines expounded by this court in the cases just cited or as even impliedly approving contentions which may conflict with the principles announced in those cases.

"Our conclusion is that the District Court rightly decided that the mayor, aldermen and commonalty of the city of New York were liable for the damages sustained by the owner of the Linda Park."

The *Workman* case is ignored in the decision of the Court of Appeals.

7. That in the *Barnes* case, this court says (p. 545):

> *"We do not regard its* (the corporation of the District of Columbia) *acts as sometimes those of an agency of the State, and at other times those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action."* (Italics ours.)

And in the *Woodbury* case (136 U. S., 450, 467) this court re-affirms the previous decisions of this court in the *Barnes, Metropolitan Railroad Company* and *McElligott* cases (*supra*), concluding, on page 457, as follows:

> *"If the rule announced in the Barnes case is not satisfactory to Congress, it can be abrogated by statute."* (Italics ours.)

8. That on December 24, 1914, your petitioner filed a motion in the said Court of Appeals (Trans. Rec., p. 104), reciting that to the end that any question as to the finality of the judgment in this cause may be concluded without any further proceedings, expense or delay, so that appellee (petitioner herein) may make application for the allowance of a writ of error in order that this case may be reviewed by the Supreme Court of the United States, appellee (petitioner herein), without prejudice to any of her rights in the premises, thereby insisting upon the validity and correctness in all respects of the judgment rendered by the trial court in her favor, as shown by the record herein, and electing to stand upon said record, moved the said Court of Appeals to recall its mandate and then amend its judg-

ment by adding thereto a direction to said trial court that the plaintiff (petitioner herein) take nothing by her writ, and that the defendant (respondent herein) go thereof without day; and the respondent, by its counsel, consented to the granting of said motion, but the Court of Appeals, on said 24th day of December, 1914, by its order denied the motion. (Trans. Rec., p. 106.)

Your petitioner says that the Court of Appeals decides in this case that the District of Columbia was in the exercise of *a governmental or sovereign duty*, and that the trial court should have directed a verdict for said municipality, said Court of Appeals thereby decides that your petitioner can not sue the respondent, and recover damages for the cause of action which accrued to her, and the case having been remanded for a new trial not inconsistent with the opinion of said Court of Appeals, your petitioner says that such erroneous ruling should be corrected by the allowance by this Court of a writ of certiorari in this case.

Upon the question of the jurisdiction of this court to allow a writ of certiorari, even though the appellate court, in remanding the cause, directs the trial court to grant a new trial not inconsistent with the opinion of the appellate court, petitioner respectfully refers to the following cases:

Forsyth v. Hammond, 166 U. S., 506;
American Construction Co. v. Jacksonville T. & K. W. R. Co., 148 U. S., 382;
United States v. The Three Friends, 166 U. S., 1.

Grounds of Petition.

For grounds of this, her petition, the petitioner represents as follows:

(1) That the dominant and far-reaching reason supporting the application of the petitioner is that neither the District of Columbia nor any other municipality can exercise

any such functions as to relieve it from liability for its negligence,—that is to say, the alleged distinction made between governmental functions and municipal duties is absolutely specious and unfounded in law or reason, as shown by the cases of *Weightman* v. *Corporation of Washington*, 1 Black, 39 (1862); *Barnes* v. *District of Columbia*, 91 U. S., 540 (1876); *District of Columbia* v. *McElligott*, 117 U. S., 621 (1886); *Brown* v. *District of Columbia*, 127 U. S., 579 (1888); *Metropolitan Railroad* v. *District of Columbia*, 132 U. S., 1 (1889); *District of Columbia* v. *Woodbury*, 136 U. S., 450 (1890); and *Workman* v. *New York, Mayor, Aldermen and Commonalty*, 179 U. S., 552 (1900).

(2) The case presents a conflict of authority between the Court of Appeals of the District of Columbia and the Supreme Court of the United States, according to the rulings of the latter court in the *Weightman*, the *Barnes*, the *Woodbury* and the *Workman* cases, *supra*, all of which cases were specially called to the attention of the Court of Appeals in petitioner's printed brief filed in that court and also on the oral argument.

(3) The decision of the Court of Appeals *expressly follows* the decision in the case of *Hill* v. *City of Boston*, 122 Mass., 344, decided March 6-12, 1877, in which latter case the Massachusetts court expressly refused to recognize the authority of or to follow the decision of the Supreme Court of the United States in the case of *Barnes* v. *District of Columbia*, 91 U. S., 552 (decided 1875); but on the contrary expressly repudiated it; and the Court of Appeals not only did not follow the decision of this court in the *Workman case* (179 U. S., 552), although urged upon it, but totally ignores it.

(4) The decision of the Court of Appeals in the instant

case is in conflict with its own decisions in the cases of *Roth* v. *District of Columbia*, 16 App. D. C., 323, and *United States* v. *Cella*, 37 App., 433.

(5) The decision of the Court of Appeals also presents a conflict with other cases, Federal and State (see brief, pp. 58-111).

(6) This case involves a question of general, if not of universal, interest and importance, that is to say, the liability of a municipal corporation, and especially the District of Columbia, for damages, for death by wrongful act upon the part of the municipality, in connection with the remodelling and repair by the municipality of a public school building during the vacation of the school session.

(7) That there are now pending in the courts of the District of Columbia, various cases of importance involving the same principle of non-liability which has been erroneously laid down by a majority of the Court of Appeals in the instant case, and a decision by this court is absolutely necessary to set at rest the question whether the District of Columbia can exercise any of its functions in such a manner as to be entirely free from liability for its negligence.

9. Your petitioner believes that the aforesaid decision and ruling of the Court of Appeals of the District of Columbia is not only erroneous, but is in conflict with the principles announced in the seven cases of this court, hereinbefore cited, and that in view of the great, if not universal importance, of the question of liability involved in the instant cause, this Honorable Court should require the said cause to be certified to it for its review and determination in conformity with Section 251 of the Act approved March 3, 1911, entitled an act to codify, revise and amend the laws relating to the judiciary, in such case made and provided.

WHEREFORE, Your petitioner prays that the writ of certiorari may issue out of and under the hand and seal of this court, directed to the Court of Appeals of the District of Columbia, demanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in said cause therein, entitled No. 2600, District of Columbia, a municipal corporation, appellant, against Susie A. Tyrrell, as administratrix of the estate of Conrad E. Tyrrell, deceased, to the end that said cause may be reviewed and determined by this court, and that the said judgment, decision and ruling of the said Court of Appeals in said cause, and every part thereof, may be reversed by this Honorable Court, and that the judgment of the Supreme Court of the District of Columbia, in said cause, may be affirmed, and grant unto your petitioner such other and further relief as the nature of the case may require and to the court may seem proper in the premises.

A certified copy of the entire transcript of the record in the case, including the proceedings in the said Court of Appeals of the District of Columbia, is filed herewith as exhibit hereto and prayed to be taken as part hereof.

SUSIE A. TYRRELL,
Administratrix of the Estate of
Conrad E. Tyrrell, Deceased, Petitioner.

ALEXANER WOLF,
LEVI H. DAVID,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss.:*

I, Susie A. Tyrrell, do solemnly swear that I am the petitioner named in the foregoing petition, by me subscribed; that I have read the said petition and know the contents thereof; that the facts therein set forth upon my personal

knowledge are true, and those therein stated upon information and belief, I believe to be true.

SUSIE A. TYRRELL.

Subscribed and sworn to before me this 28th day of December, 1914.

GEORGE W. OFFUTT, JR.,
Notary Public, D. C.

(SEAL.)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No.....

SUSIE A. TYRRELL, as Administratrix of the Estate of Conrad E. Tyrrell, Deceased, *Petitioner*,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation, *Respondent.*

MR. CONRAD H. SYME,

Corporation Counsel of the District of Columbia,

Attorney for the above-named Respondent.

Please take notice that the undersigned counsel, on behalf of the petitioner above named, will present the foregoing petition for a writ of certiorari, and the brief hereto annexed, together with the record in the above-entitled cause, to the Supreme Court of the United States, on Monday, the 18th day of January, 1915, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

ALEXANDER WOLF,

LEVI H. DAVID,

Attorneys for Petitioner.

Service of the foregoing notice, and a copy thereof, together with a copy of the petition and accompanying brief therein mentioned, is hereby acknowledged this 29th day of December, 1914.

C. H. SYME,
F. H. S.
Attorney for District of Columbia,
a Municipal Corporation, Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No.....

SUSIE A. TYRRELL, as administratrix of the Estate of Conrad E. Tyrrell, deceased, *Petitioner*,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation, *Respondent.*

BRIEF FOR PETITIONER.

ALEXANDER WOLF,
LEVI H. DAVID,
Attorneys for Petitioner.

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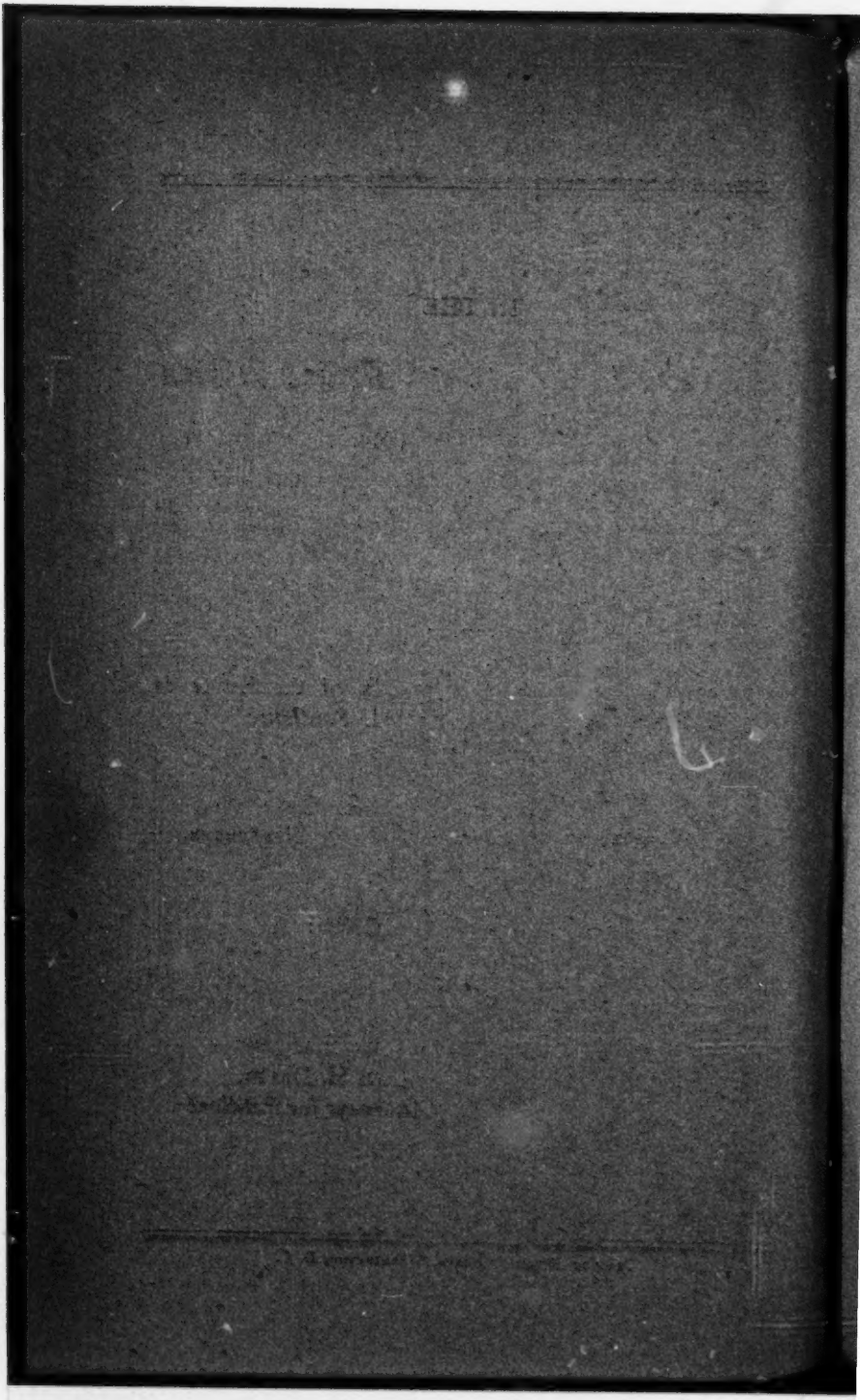

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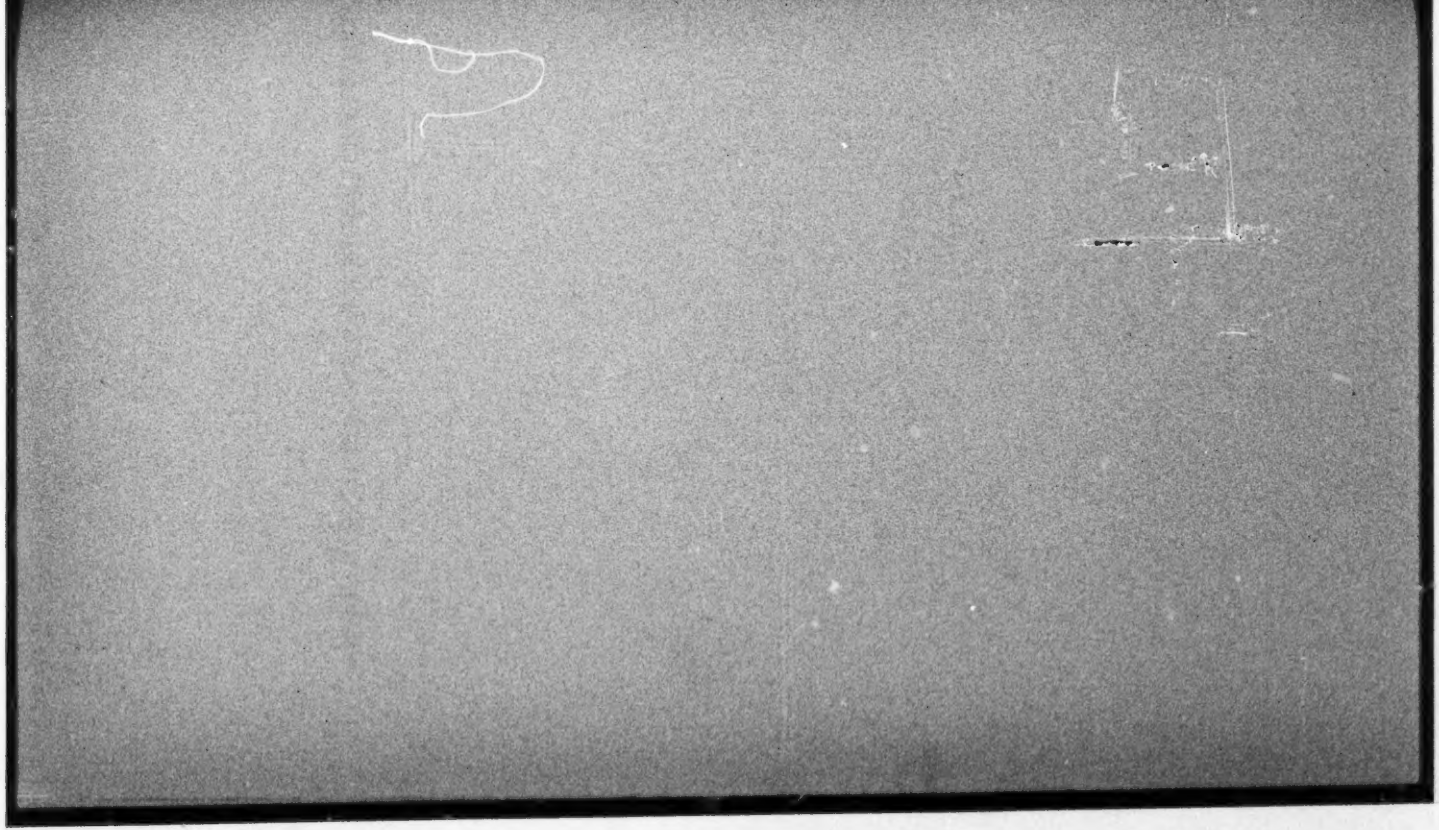

IN THE

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SUSIE A. TYRRELL, as administratrix of the Estate of Conrad E. Tyrrell, deceased, *Petitioner*,

vs.

DISTRICT OF COLUMBIA, a Municipal Corporation, *Respondent*.

BRIEF FOR PETITIONER.

I.

STATEMENT OF THE CASE.

The petitioner (plaintiff), Susie A. Tyrrell, as administratrix of the estate of her husband, Conrad E. Tyrrell, recovered a judgment, in the sum of $7,000, in the Supreme Court of the District of Columbia, against the respondent

(defendant), the District of Columbia, a municipal corporation, in an action for damages, for the death of the said Conrad E. Tyrrell, occasioned by an explosion of gas which occurred while plaintiff's intestate, a boiler-maker, was at work in the basement of the old McKinley Manual Training School building, the real estate being owned and possessed, in fee simple, by, and in sole charge of, the defendant at the time of the accident. This building is situated at the southeast corner of 7th Street and Rhode Island Avenue, N. W.—one of the most populous sections of the city. The accident occurred in the afternoon of Saturday, September 2, 1911, while the defendant was having certain repairs made on its property.

In the appropriation act, approved March 3, 1909 (35 Stat. L., 709), providing for the expenses of the Government of the District of Columbia for the fiscal year ending June 30, 1910, the sum of $100,000 was appropriated for the purchase of additional ground for further extension of McKinley Manual Training School; and also the sum of $95,000, for the construction of a further extension of said school; and the further sum of $60,000, or so much thereof as may be necessary, "for repairs and improvements to the school buildings and grounds" * * * "and for such miscellaneous alterations and repair work as may be necessary to secure protection against fire in existing school buildings owned by the District of Columbia."

On December 23, 1910, the defendant engaged the Gormley-Poynton Company to construct an addition to the McKinley Manual Training School building; and also to furnish and install in the basement of the old building, two additional steam-boilers, smoke-breechings, smoke-stack, etc. Under the contract, the contractors agreed to receive and obey orders, in connection with the entire work, from the Engineer Commissioner, or his assistants, the Municipal

Architect and his inspectors representing him, on behalf of the District of Columbia. The contract also provided that the contractors should so conduct their operations as to interfere with the work of other District contractors as little as possible; the contract further provided that inspectors, representing the defendant, District of Columbia, should have access to all parts of the work at all times, whose duty should be to point out to the contractors any neglect or disregard of the specifications or contract; that upon all technical questions concerning the execution of the work, in accordance with the specifications and measurements thereof, the decision of the Engineer Commissioner of the District of Columbia, should be final, one inspector to be employed by the District of Columbia for each section of the work under the contract; and provision was made for additional inspectors, as they might be required, to be employed by the District of Columbia, at the rate of $4.50 per diem each, the cost of the same to be charged to the contractors. (Add. Rec., 2.) Present Rec. 17-18

The contract also provides that the contractor will be held responsible for the care of the building materials delivered at the site and intended to be used in the construction of the building, and for all loss or damage that may accrue to the same, as well as to passers-by or persons employed in or about the building and to owners or occupants of adjoining premises legally affected during the term of his contract; and as soon as practicable during the work, he shall repair all damage to neighboring property, and leave all perfect. (Add. Rec., 2.) Present Rec. 18

The contractors sub-let various portions of the work to sub-contractors. Evans-Almoral Company was a sub-contractor; and G. W. Forsberg, a machinist, was employed as a sub-contractor by Evans-Almoral Company, to install the steam-boilers, smoke-breeching, etc., in the old building.

The entire work of Forsberg (through his foreman, plaintiff's intestate), irregularly performed, covered a period of six weeks or two months. Forsberg and his employees had nothing to do with the gas pipes or the meters.

The old building, in which the boiler-room is located, was erected about eleven years before the date of the Gormley-Poynton contract. (Add. Rec., 3.) At the time of its erection, gas pipes were installed in the ceiling of said building, and they remained there, gas being used throughout the said building. (Add. Rec., 11.)

Gormley-Poynton Company, its sub-contractors, as well as Forsberg, sub-contractor, had nothing to do with the gas pipes, either in the boiler-room, or in any part of the old building. The boiler-room, where Forsberg's work was performed, was immediately under the assembly hall in the old building. Breeching is a smoke-flue to carry off smoke from boilers—it has nothing to do with the illuminating gas plant.

Gormley-Poynton Company began the construction of the annex, under its contract, about a week after its date. Snowden Ashford, the Municipal Architect, had the inspection and general charge and supervision of all the said work for the District of Columbia. About a month after the work had been in progress, Wm. H. German, an employee of the District of Columbia, was designated inspector or superintendent of the work, and he superintended the work until its completion. (Add. Rec., 3, 17.)

It was conceded at the trial by counsel for the defendant that gas was used in the McKinley Manual Training School building for public purposes, and that the bills for service of gas there were paid by the defendant, the District of Columbia. (Add. Rec., 14.)

School session closed about June 18, 1911. During the summer months and up to and including September 2,

1911, the date of the accident, the old building and ground being in possession and charge of its owner, the defendant, the District of Columbia, the defendant carried on its building operations on the land adjacent to the old building and also proceeded to make alterations and repairs in the boiler-room of said old building. The defendant contemplated to have completed all of the work prior to the opening in September (a date subsequent to the happening of the accident) of the 1911-1912 school session, in order that the possession of the buildings might, at the opening of school, be turned over to the school authorities. (Add. Rec., 4.) Pleasant Rec.

Frank C. Daniel, a teacher of the McKinley School, returned from his vacation during the last week in August, and went directly to the school building and spent a great deal of time there until school began. About a week previous to September 2d, he detected the odor of gas in the old building. It seemed to be worse at the entrance to the assembly hall. He noticed it first in the corridor between his office and the assembly hall. He asked Maddox, the janitor, to locate the leak, if he could. He also called the matter to the attention of Mr. Chamberlain, Supervisor of Manual Training. (Add. Rec., 12.) Pleasant Rec., 27

Mr. Chamberlain testified that he knew William H. German, defendant's inspector and superintendent of construction, saw him there sometimes daily, and sometimes two or three times a week, upon occasions of his (Chamberlain's) visits to the building. Mr. Chamberlain did not make any search for the leak. He had been downstairs in the boiler-room, where the work was going on before he noticed the odor of gas; that he did not detect any odor of gas downstairs at all; he was in the assembly hall for a minute or two; when he observed the odor, he was on his way out of the building, and stopped at the office of Mr. Daniel, the Principal, and that is where he first noticed the

gas; he spoke to Mr. Daniel about it, and he (Daniel) said he had also noticed it; he went along the corridor and along the assembly hall where it seemed to be more noticeable; after the explosion, he went into the boiler-room, but could not see the pipe at all—it was up over the boilers, and it was dark there; and that he could see where the ceiling had been blown off, exposing the terra-cotta pipes. (Add Rec., 13.)

Hyland Maddox, the janitor, testified that on Thursday (August 31, 1911), between 9 and 12 o'clock, Professor Daniel called his attention to the odor of gas in the building; that he and his assistant went in the assembly hall and made an attempt to locate the leak without success; that he then saw German and said to him: "Mr. German, come in here; I have a leak in here. See if you can help me find it." "Mr. German made no reply, he walked down and went out of the front door in his office. Afterward I reported it to Mr. German; he said nothing to me on either Thursday, Friday or Saturday about it—Mr. German made no attempt to locate it" (Add. Rec., 14); that no effort was made to find the leak in the old part of the building; that, in reference to repairs at the school building, it is the duty of the janitor, as Maddox testified, to notify the Principal, who, in turn, reports the same to the Franklin School, and they, in turn, notify the office of defendant's Repair Shop, and then the Repair Shop should send some one there to fix the leak if one occur in the old building. (Add. Rec., 14.)

Henry Story testified (Add. Rec. 7) that he had been employed by the defendant, as its Superintendent of the District Repair Shop for about six years; that the District of Columbia maintains a repair shop, and at this shop the District employs one hundred to two hundred and fifty men, who perform all kinds of general repair work, such as plastering, carpentry, tinning work, plumbing and painting, in various buildings owned by the District of Columbia; that

at the District Repair Shop a regular complaint book is not kept, but "a telephone book is kept," and in it are put messages received from the different foremen, giving information as to repairs needed in District buildings. He further testified that when the Repair Shop "is notified that there is a leaking gas pipe in a District building, we repair it." (Add. Rec., 7.) He further testified that his book containing entries of complaints of leaking gas pipes in District of Columbia buildings did not show a complaint regarding the leaking gas pipe, in September, 1911, in the McKinley School building, and the witness did not remember any notice to the Repair Shop in regard thereto. He further testified: "It is only emergency repairs that we would have attended to, which we received notice of over the telephone"; that the plumber of the District Repair Shop reports to him daily; that the names of mechanics, including plumbers, employed at the Repair Shop are put on the pay-roll, and sent to the D. C. disbursing officer. (Add. Rec., 7.)

The Commissioners of the District of Columbia passed an order March 15, 1899, which was in force in 1911, which placed the office of Superintendent of Repairs under immediate control of the Engineer Commissioner, who placed said Shop under the Municipal Architect. (Add. Rec., 15.)

Thos. Whalen had been employed for five years as a plumber in the District Repair Shop and does plumbing work in District buildings. Whalen is under the Municipal Architect, and is subject to his orders. (Add. Rec., 3.)

German, inspector, or superintendent of construction, who was at the said work constantly, was also under the Municipal Architect, and made written reports daily to the Municipal Architect in regard to the progress of the work and matters connected therewith. (Add. Rec., 19.)

Sidney L. Hechinger, an employee at the work, testified (Add. Rec., 15) that he smelled gas in the building before the accident happened, but did not remember how many days prior thereto, and that he remembers going over the building with German endeavoring to find the leaking pipe. "I think we smelled gas in the assembly hall the first time. I suppose we attempted to search the boiler-room; do not remember that exactly; it was almost impossible to search the boiler-room for it, because it was a large room, and had lots of machinery in it, and the lights are high up on the ceiling, and those that were in there were lighted. A plumber could have found the leak, I suppose, by using peppermint, or whatever they use to try it. I don't know whether peppermint is the proper stuff, but they use some chemical. I don't know how it is done. I know that the gas was not turned off, and peppermint was not put in by me or by Mr. German in searching for the leak" * * * "that he and German tried to find this leak by walking around the building smelling." (Add. Rec., 16.)

Frederick Vermillion, assistant janitor, testified (Add Rec., 16) that "about two or three days before the explosion in question, I went with Maddox all around the building endeavoring to find the leaking gas pipe. I first smelled the gas in the assembly hall, and do not remember going in the boiler-room. I could not locate the leaking gas pipe. I saw Mr. German, the District Inspector, at said building the morning before the explosion. I do not know whether German looked for the gas leak, and have no recollection of conversing with him as to the leaking gas pipe." (Add. Rec., 17.)

Plaintiff's intestate, Conrad E. Tyrrell, was a boilermaker by occupation, and in 1911 was employed by G. W. Forsberg, earning a regular salary of $15 a week, and for overtime he was paid at the rate of $5 a day. (Add. Rec., 7-8.)

In the latter part of August and up to and including September 2, 1911 (Saturday), Forsberg's employees—plaintiff's intestate, foreman, and three colored helpers, Wm. Moore, Magruder Datcher and Fred Greene, were at work, carrying out Forsberg's contract, in defendant's old building, installing the breeching, etc., in the boiler-room. (Add. Rec., 6.) Pleasant Rec. 21

Moore testified (Add. Rec. 8-9) that on the occasion of his first visit to the old building they put up all of the material they had and then returned to Forsberg's shop to get more material; that he first smelled the odor of gas on Wednesday preceding the accident on Saturday, in the basement of the old building; that on Wednesday he and Tyrrell were there, and that on Friday Green and Datcher were also there; that he spoke to Tyrrell about the escaping gas; that the gas was not very strong on Thursday, but was getting severer on Saturday evening; that they worked there all day Friday. The escape of gas was severe on Friday; that he could not say where the gas was leaking; that on Saturday, while they were eating lunch, he told Tyrrell that if he did not say something about the gas they would not be able to stay there until 4 o'clock; that Tyrrell told him that the Superintendent had asked him (Tyrrell) to look for the leak in the gas pipe; that they had just got through lunch and were fixing to go to work; it was about 12:30 o'clock, or something like that, when Tyrrell looked for the gas leak—he was lying right flat on his stomach—straight out on the breeching; that Tyrrell asked him for a match and witness told him that he did not have one. He said for me to bring him a piece of paper. Witness twisted a piece of paper, went up the ladder and gave it to him; that they searched for the leaking gas pipe. An explosion took place and the whole thing toppled right down on him (Tyrrell). Tyrrell was pulled out. Witness described Tyrrell's injuries.

Present Rec. 25-26

Datcher testified (Add. Rec., 10-11) that he went to the building Friday, about 9:30 o'clock, preceding the explosion, and observed the odor of gas in the basement of the building; that he did not speak about it until about 11 o'clock Friday, which was his first day there; that he saw Mr. German walking through the building, and it looked like he had something to do with the work there; that witness was on top of the boiler on Friday, and said to Mr. German: "Boss, there is gas escaping in here pretty heavy, and I can't stay in this place to work in here"; that German made no answer to witness. This was Friday about 11 o'clock; that on Saturday after 10 o'clock witness spoke to German, saying to him: "Boss, the gas is escaping worser today than it was yesterday." German did not give him any answer; that on Saturday, about 12:30 o'clock, Tyrrell said to witness and Green: "Green, you and Datcher stay down here and finish punching them holes in that iron, and Moses [William Moore], you come up here with me"; that Moses went up the ladder and got on the boiler with Tyrrell; that Tyrrell went away, stayed a little while and came back and asked Moses to give him a match. Moses said he had no match and Tyrrell said for Moses to hand him a piece of paper. Mr. Tyrrell had a lantern in his hand. Moses handed him the piece of paper, and Mr. Tyrrell went right to work again, but shortly after that witness heard an explosion; that it was dark on top of the boiler where Mr. Tyrrell and Moses were working, but it was light down below in the boiler-room; that witness saw no gas pipes—that they touched no pipes—that they were not working on gas pipes. "We were working on the smoke-box"; that they got Tyrrell out of his position, and that he helped him down the ladder. Tyrrell was hurt about his head. He had, witness thinks, a hole on the side of his face and one on his chin. (Add. Rec., 11.) Present Rec. 26

On cross-examination, witness testified that they did not know where the pipe was; that he did not smell the odor of gas down below, but did up above where Mr. Tyrrell was working. (Add. Rec., 11.) Present Rec. 26

It was also proven that plaintiff's intestate died the following day as a result of the injuries he received, by reason of the explosion. (Add. Rec., 13.) Present Rec. 28

And further, that the fee simple title to the premises, where the accident occurred, was in the defendant. (Add. Rec., 3.) Present Rec. 18

Present Rec. 32-3

German, called by the defendant, testified (Add. Rec., 17-19) that he was employed as Inspector at the building referred to; that the gas leak in the old building was reported to him by the janitor, and after endeavoring to find the leak without success, he asked Tyrrell if he detected any odor of gas among the conduits overhead, where he was working; that he replied that he did not, and witness cautioned him not to proceed until the leak had been discovered; that so far as witness knows, the odor of gas was first detected on Friday, the day before the accident; that the odor was in the assembly room over the boiler-room, where Tyrrell was working. The conduits and pipe or pipes, in regard to which witness asked Tyrrell when he spoke to him about the odor of gas, were in the angle between the wall and the ceiling; that they were exposed to view; that when the explosion occurred witness was on his way out to the corridor to find the janitor to have him turn the gas off; that witness's recollection is, that on going out, witness told Tyrrell that he was going to have the janitor turn the gas off; that witness's recollection is that the accident happened about 2 o'clock in the afternoon; that during Friday, when the odor of gas was noticeable in the assembly room over the boiler-room, witness assisted the janitor to locate the source of the odor, in the assembly

hall, thinking there was where the leak was; that witness made no efforts to locate the odor in the boiler-room, other than asking Tyrrell if he could discover any odor along the pipes or conduits; that he assisted Tyrrell to the drug store after the accident, and helped to dress the abrasion on his forehead.

Present Rec. 33-4

On cross-examination, witness testified (Add. Rec., 18-19) that his hours of work at the building were from the time the operations commenced in the morning until they ceased; that witness was under the direction of the Superintendent of Inspectors and the Municipal Architect; that the part of the building in which Tyrrell was working was the second addition which, at that time, had been erected about six years; that witness first learned of the presence of gas in the assembly room about 8 o'clock in the morning of the day previous to the explosion, from the janitor, Maddox; that after he obtained information that there was a leak of gas in the building, witness's recollection is that he did not report the fact to the District Repair Shop; that Professor Daniel never informed witness that gas was escaping under the floor of the assembly room; does not remember hearing Maddox speak to him about the escaping gas beneath the floor of the assembly room on Thursday prior to the accident; that it was somewhere between 9 and 11 o'clock on Saturday morning that he asked Tyrrell if he detected any odor of gas; that witness may have made a report of escaping gas in his daily report to the Municipal Architect, but is not certain; that witness first heard of the escaping gas early Friday morning; that he did not direct the janitor to turn off the gas, at this time, but on Saturday preceding the accident, witness looked for the janitor to have him turn off the gas, but the janitor was not to be found just at this time. This was just preceding the accident. Witness requested Tyrrell to find the leak of gas by smelling along the pipes to see if he could detect the odor, and wit-

ness's recollection is that Tyrrell did so, and replied that he could not detect it. This was in the forenoon of Saturday. Witness never went on top of the boiler. Witness understood that gas was of a highly explosive nature. Does not remember that Tyrrell complained to witness on Friday about the presence of gas. Witness may have requested Hechinger to try to find the leak. (Add. Rec., 19.)

Wm. L. Webster, chief inspector for the defendant in the construction of the third addition to the McKinley School, testified (Add. Rec., 19-20) that he was on top of the boiler two hours after the accident happened, but was not there prior to the accident; that he saw where the hole was blown in the ceiling; that he went up a ladder and got on the boiler; the breeching was about 2½ to 3 feet distant from the top of the ceiling; a part of the pipe was encased in the terra cotta, and a part of it sunk below the terra cotta ceiling; and that there was an elbow in the gas pipe which was cracked.

On cross-examination Webster was asked (Add. Rec., 20) to state where the arched elbow was, and he answered: "These terra cotta arches are 12 inches deep, and on top of that arch after they are placed, we put in a 2-inch cinder fill in which to imbed the timber to which the finished floor is nailed. The elbow was broken right at the top of that arch, in the cinder fill." That he discovered it when he made an inspection, about two hours after the accident happened; that it is impossible for witness to state exactly how long the pipe had been broken; that if the pipe had been broken before, the gas would have been noticed throughout the building; the arch was right in the re-entrance of the angle of the elbow, and that the elbow was 4 or 5 feet from the smoke-box or breeching. (Add. Rec., 20.)

Henry R. Thompson, called by defendant, testified (Add. Rec., 20-21) that he was the engineer at the building at the time of the explosion, and was in the engine-room when

the explosion occurred; that he does not recollect whether he detected any odor of gas where Tyrrell was working any time prior to the explosion; that he had been in the room, off and on, where Tyrrell was working, but does not recollect whether he had been in that room on the day of the explosion; the gas pipe in the boiler-room where Tyrrell was working was located about 8 inches from the ceiling—practically over his head; it was near the corner of the room; there was breeching all along the gas pipe; one gas pipe and several water pipes were exposed; prior to the accident witness saw no other pipes around them, or atached in any way; when the explosion occurred witness went in there; there was a man on the ladder, and witness climbed up the boiler front to assist the man; at that time you could not see anything but dust and pieces of terra cotta; prior to the explosion witness did not see anything done by anyone in connection with this gas pipe which exploded; prior to the explosion witness did not see any pipes hanging from the ceiling, attached by a rope to anything; and that witness did not know anything about anybody jacking up any pipe or conduits there prior to the explosion.

There was no cross-examination of the witness Thompson.

There was no evidence that Tyrrell had any fire in any form.

II.

ARGUMENT.

(a) Statutes Relative to Construction and Repair of Public School Buildings as Such.

The act of March 3, 1879 (20 St. L., 408), provides as follows:

> "The inspector of buildings of the District shall have authority and control over, and supervision of, the con-

struction and repairs of all school buildings, if the Commissioners deem best to delegate the same to him."

The act of March 2, 1889 (25 St. L., 800), providing for school and other buildings, contains the following:

"The plans and specifications for each of said buildings, and for all other buildings provided for in this act, shall be prepared by the inspector of buildings of the District of Columbia, and shall be approved by the architect of the Capitol and the Commissioners of the District, and said buildings shall be constructed by the Commissioners in conformity therewith."

The appropriation act of March 3, 1909 (35 St. L., 709), providing for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1910, enacts among other things as follows:

"For rent of school buildings, repair-shop, storage, and stock-rooms, twenty thousand dollars.

* * * * * * * * *

for repairs and improvements to school buildings and grounds, and for repairing and renewing heating and ventilating apparatus, seventy-five thousand dollars. For necessary repairs to and changes in plumbing in existing school buildings, fifty thousand dollars.

* * * * * * * * *

For the purchase of additional ground for further extension of McKinley Manual Training School, one hundred thousand dollars. For construction of a further extension of McKinley Manual Training School, ninety-five thousand dollars.

"For additional amount for 'Repairs and improvements to school buildings and grounds,' for the purpose of replacing wooden stairways in brick buildings with those of fire-proof construction, removal of old and

unsuitable fire ladders and fire escapes, improving exits, and for such miscellaneous alterations and repair work as may be necessary to secure protection against fire in existing school buildings owned by the District of Columbia, sixty thousand dollars, or so much thereof as may be necessary, to be immediately available.

"That the total cost of the sites and of the several and respective buildings herein provided for, when completed upon plans and specifications to be previously made and approved, shall not exceed the several and respective sums of money herein respectively appropriated or authorized for such purposes.

"That the plans and specifications for all buildings provided for in this Act shall be prepared under the supervision of the municipal architect of the District of Columbia, and shall be approved by the Commissioners of the District of Columbia, and shall be in conformity thereto."

This act also makes provision for "inspector of gas and meters, two thousand dollars; assistant inspector of gas and meters, one thousand dollars; assistant inspector of gas and meters, nine hundred dollars."

Provision is made for a municipal architect in the following words:

"* * * municipal architect, whose duty it shall be to prepare and supervise the plans for, and superintend the construction of, all municipal buildings, and the repair and improvement of all buildings belonging to the District of Columbia, under the direction of the Engineer Commissioner of the District of Columbia, three thousand six hundred dollars; and all laws and parts of laws placing such duties upon the inspector of buildings of the District of Columbia are hereby repealed; in all two hundred thousand seven hundred and eighty-two dollars."

The appropriation act of May 18, 1910, providing for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1911, contains the following language:

> "For rent of school buildings, repair-shop, storage, and stock-rooms, sixteen thousand dollars.
> * * * * * * * * *
> "For repairs and improvements to schools buildings and grounds, and for repairing and renewing heating and ventilating apparatus, sixty thousand dollars.
> "For necessary repairs to and changes in plumbing in existing school buildings, forty thousand dollars. * * *"

Relative to the office of the municipal architect of the District of Columbia, this act makes the following provision:

> "MUNICIPAL ARCHITECT'S OFFICE: Municipal architect whose duty it shall be to prepare or supervise the preparation of plans for, and superintend the construction of, all municipal buildings, and the repair and improvement of all buildings belonging to the District of Columbia, and serve under the direction of the Engineer Commissioner of the District of Columbia, three thousand six hundred dollars (transferred from the Engineer's office); * * * superintendent of repairs, fifteen hundred dollars (transferred from Engineer's office); * * * in all, seventeen thousand two hundred and ten dollars."

This act reappropriates and makes immediately available any unexpended balance not obligated in the aforesaid appropriation act for the fiscal year ending June 30, 1909, for the completion of the McKinley Manual Training School Building, and makes other provisions in the following words:

"Any unexpended balance not obligated in the 'Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and nine, for the completion of the McKinley Manual Training School Building' is hereby appropriated and made immediately available for the further extension of that building.

"For additional amount for 'Repairs and improvements to school buildings and grounds' for the purpose of providing additional fire protection, such as fireproofing heating apparatus, fireproofing corridors, alterations to heat and vent flues, and construction of fireproof storage for fuel and ashes, and the purchase and erection of fire extinguishers and fire alarms, to be immediately available, thirty-seven thousand five hundred dollars.

"That the total cost of the sites and of the several and respective buildings herein provided for, when completed upon plans and specifications to be previously made and approved, shall not exceed the several and respective sums of money herein respectively appropriated and authorized for such purposes.

"That the plan and specifications for all buildings provided for in this Act shall be prepared under the supervision of the municipal architect of the District of Columbia and shall be approved by the Commissioners of the District of Columbia, and shall be constructed in conformity thereto.

"School buildings authorized and appropriated for herein shall be constructed with all doors intended to be used as exits or entrances opening outward and each of said buildings having in excess of eight rooms shall have at least four exits. No part of any appropriation carried in this Act shall be used for the maintenance of school in any building unless all outside doors thereto used as exits or entrances shall open outward and be kept unlocked every school day from one-half hour before until one-half hour after school hours.

"All appropriations for sites for school buildings and

for the construction of school buildings contained in this Act are hereby made immediately available."

Similar provisions are contained in the later appropriation acts. For instance, the act of March 2, 1911, making appropriations for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1912, provides:

"For rent of school buildings, repair shop, storage and stock rooms, sixteen thousand dollars.

* * * * * * * * *

"For repairs and improvements to school buildings and grounds and for repairing and renewing heating, plumbing, and ventilating apparatus, seventy thousand dollars, to be immediately available.

"For special repairs to and changes in plumbing in existing school buildings, twenty-five thousand dollars.

* * * * * * * * *

"For additional amount for 'Repairs and improvements to school buildings and grounds' for the purpose of providing additional fire protection, such as fireproofing heating apparatus, fireproofing corridors, alterations to heat and vent flues, and construction of fireproof storage for fuel and ashes, and the purchase and erecting of fire extinguishers and fire alarms, to be immediately available, thirty-seven thousand five hundred dollars.

* * * * * * * * *

"That the plans and specifications for all buildings provided for in this Act shall be prepared under the supervision of the municipal architect of the District of Columbia and shall be approved by the Commissioners of the District of Columbia, and shall be constructed in conformity thereto.

* * * * * * * * *

"All appropriations for sites for school buildings and for the construction of school buildings contained in this Act are hereby made immediately available."

The appropriation act of June 26, 1912, for the fiscal year ending June 30, 1913, provides:

> "For rent of school buildings, repair shop, storage and stock rooms, twenty-two thousand dollars.
> * * * * * * * * *
> "For repairs and improvements to school buildings and grounds and for repairing and renewing heating, plumbing, and ventilating apparatus, and the installation of sanitary drinking fountains in buildings not supplied with the same, eighty-five thousand dollars, to be immediately available."

The appropriation act of March 4, 1913, for the fiscal year ending June 30, 1914, provides:

> "For rent of school buildings, repair shop, storage and stock rooms, $17,000.
> * * * * * * * * *
> "For repairs and improvements to school buildings and grounds and for repairing and renewing heating, plumbing, and ventilating apparatus, and the installation of sanitary drinking fountains in buildings not supplied with the same, $100,000."

(b) Defendant Liable Under Statutes.

The foregoing acts show that the duties of the construction and repair of all public school buildings are imposed upon the District of Columbia strictly as municipal duties, and that these duties are wholly apart from and independent of the subject of the control of the school system as such, that is to say, the construction and repair of public schools are strictly municipal duties, conceding for the time being that the control of the school system as such is a governmental duty. In other words, the District of Columbia has imposed upon it, with reference to the construction and re-

pair of the public school buildings owned by it, duties of exactly the same class and character as those which it performs with reference to the streets, avenues, alleys, sewers, and bridges. At the time of the injuries in question the Board of Education had control of the school system, as such, and the municipality had the duty of constructing and repairing the public school buildings, as such, the two subject-matters being totally separate and distinct from each other, conceding for the argument that the Board of Education is independent, and not an agent, of the District of Columbia in its municipal capacity. That the construction and repair of public school buildings have always been considered as statutory duties imposed upon the District of Columbia in its capacity of a municipal corporation, and not as governmental duties, is established not only by the provisions of the statutes above recited, but also by the decisions of the Supreme Court in *Weightman v. Corporation of Washington* (1861), 1 Black., 39; *Barnes v. District of Columbia* (1875), 91 U. S., 540, and *Woodbury v. District of Columbia* (1890), 136 U. S., 480, and other cases hereinafter cited in this brief.

(c) Statutes Relative to the Public School System as Such.

An excellent epitome of the statutes relative to the public school system as such is found in the recent book of Mr. Dodd on the *Government of the District of Columbia* (1909), the author being an expert in local municipal laws and affairs. That epitome leads up chronologically to the act of June 20, 1906, which prescribes the present organization of the local school system, the control of which (*not construction and repair of buildings*) is now vested in the Board of Education.

Members of the Board serve without compensation, and are irremovable during the terms for which they have been

appointed. The Board meets at least once a month during the school year, and at such other times as it thinks proper. All meetings of the Board are open to the public, except committee meetings dealing with the appointment of teachers. The Board appoints a secretary, who has charge of its office, and has the custody of school supplies. Mr. Dodd says (pp. 231-232):

> "The control of the school administration by the Board of Education is not absolute. *The construction and repair of school buildings are under the direction of the Commissioners.* All school supplies are obtained by means of requisitions upon the Commissioners, but the Secretary of the Board of Education is a member of the Committee which has supervision over the purchase of supplies for the District of Columbia. The Board of Education annually transmits to the Commissioners a detailed estimate of the amount of money required for public schools for the ensuing year, and the Commissioners are required to transmit this estimate to Congress; however, the Commissioners also submit to Congress their own estimates for schools, which, in fact, usually differ little from those of the Board of Education, and in the congressional committee hearing on appropriation, both the Commissioners and Board of Education are heard; yet the Board of Education cannot be said to have absolute control over the annual estimates of funds necessary for the operation of schools. All expenditures for schools are made and accounted for under the control of the Commissioners. All accounts against the Board of Education are first audited by the Secretary of the Board, and are then sent to the Commissioners for approval; they are subject to further audit by the Auditor of the District of Columbia, and by the auditing officials of the Treasury Department."

The exact powers and duties of the Board of Education are succinctly stated by Mr. Dodd in these words (p. 232):

> "The Board of Education determines all questions of general policy relating to the schools, has the direction of expenditures for educational purposes, appoints the executive officers of the schools and defines their duties, appoints and removes teachers, in conformity with the rules established by law."

Each school building is in charge of a janitor, who has the usual duties of cleaning the building and attending to the fires. The janitor is required to make such repairs as he can, and to report other needed repairs to the principal of his building. There is a superintendent of janitors who supervises the work of all janitors and instructs them in their duties, and who is required to inspect the heating and ventilating apparatus of the school buildings, and to report all needed repairs to the secretary of the Board of Education. It is one of the duties of the medical inspectors of schools to call attention to unsanitary conditions in school rooms or school buildings. At the request of the Board of Education, or under instructions from the Commissioners, systematic inspections of schools have been made by the District government. In 1908 the Fire Department made an investigation of the condition of the school buildings from the standpoint of fire protection, and in 1907 an investigation of the sanitary condition of the schools was made under the direction of the health officer. In 1908 two committees were appointed for the regular and systematic inspection of school buildings. One of these committees was composed of an assistant to the engineer commissioner who was in charge of buildings, the inspector of buildings, and the chief engineer of the fire department.

This committee examined all new buildings, and inspected other buildings, to determine questions regarding their structural conditions, and proper protection from fire. The other committee was composed of the same members, except that the health officer displaced the chief engineer of the fire department, and inspected buildings with a particular reference to their sanitary condition.

Relative to the preparation of plans for new school buildings, and to building repairs, Mr. Dodd says (p. 246):

> "Plans for new school buildings are prepared in the engineer department of the District of Columbia by the municipal architect, and are subject to the approval of the Commissioners. Building repairs are also made under the direction of the municipal architect. In preparing plans and making repairs this officer necessarily acts in close co-operation with the Board of Education. Plans for new buildings are always submitted to the Board of Education before being approved by the Commissioners. All buildings of more than eight rooms are required by law to have at least four exits, and all doors are required to open outward."

In support of the statement just quoted, Mr. Dodd cites the act of March 3, 1909, and says that until the passage of this act plans for school buildings were prepared under the supervision of the inspector of buildings, and that building and plumbing repairs were made under the direction of the inspector of buildings and the inspector of plumbing.

Particular attention is called to the fact that throughout the whole body of school laws hereinbefore referred to or cited there is not a single provision which in any manner relieves the District of Columbia from the corporate duty of constructing and repairing the public school buildings, nor is there any power given to or duty imposed upon the

Board of Education either to construct or repair such buildings. The laws affirmatively impose the absolute duty upon the municipality, in its corporate capacity, to construct and repair the school buildings, and places at its disposal the funds necessary for such purposes. The Board of Education merely has control of the *school system as such* while the District of Columbia, in its municipal capacity, not only owns the buildings in fee simple, but has the express affirmative duty of constructing them in the first instance, and keeping them in repair in the second. Conceding, for the time being, that the Board of Education exercises a governmental function in its control over the school system as such, yet it must be remembered that, at the time of the injury and death complained of, the Board of Education was not in the exercise of its functions at all, school was not even in session, and the exercise of the governmental function was in abeyance by reason of the summer recess, while the District of Columbia, in its private, administrative, corporate, municipal capacity, as the owner of the building in question, resting under an express statutory duty to do the work and make the repairs in progress, was in the actual physical possession, control, and management of the building itself, and solely through its conduct, the creation and maintenance of a nuisance, in the shape of escaping gas, was directly and solely responsible for the wrongful death of the plaintiff's intestate. To summarize:

(1) If the District of Columbia in performing, or in having performed for it, the work in which Tyrrell was engaged at the time he was fatally injured, was in the exercise of a private, corporate, administrative, municipal function or duty, it is legally liable for the distressing consequences of its wrongful acts; (2) if, at the time mentioned, the District was in the exercise of a governmental duty, but was performing it under a statutory obligation imposed

by Congress which did not relieve the District from liability for its wrongful conduct, then it is equally liable; and (3) if the doctrine that the District of Columbia in the exercise of a so-called governmental duty is exempt from the consequences of its infliction of a positive wrong on the person or property of the citizen is a fallacy, then it is likewise liable in this case. The Supreme Court of the United States has directly affirmed its liability in each of the instances just mentioned.

(d) Defendant Liable for Nuisance in Escape of Gas Regardless of Negligence.

In *Midwood & Co. v. Mayor, Aldermen and Citizens of Manchester*, L. R., 2 King's Bench Div. 597 (1905), the defendants were empowered by the Manchester Electric Lighting Order, 1890, made under the Electric Lighting Acts, 1882 and 1888, and confirmed by Act of Parliament, to supply electrical energy in their district, and for that purpose to lay down electrical mains, but it was provided by clause 70 of the order that nothing therein contained should exonerate them from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them. One of their mains fused, and the bitumen in which the main was laid in consequence became volatilized into an inflammable gas, which accumulated for some time, [three hours] and then exploded, causing a fire by which the plaintiffs' goods were damaged:

> "Held, that, apart from any question of negligence, the defendants were liable to the plaintiffs as for a nuisance by reason of the provisions of clause 70 of the order."

The court said:

> "The action was brought to recover damages in respect to injury to stock-trade and other property of

the plaintiffs upon the premises belonging to them in Manchester by a fire occasioned through the electrical apparatus maintained by the defendants, who were the undertakers for the supply of electricity for lighting and other purposes in Manchester. The claim of the plaintiff was put alternatively, it being alleged first that the damage was due to a nuisance caused by the defendants, and secondly that the defendants were guilty of negligence which led to the damage.

"It appeared that there had been a fusion of one of the electric cables or mains laid down by the defendants in a street in Manchester in consequence of a failure in the insulation of the conductors, which caused a breakdown in the insulation and a short circuit or leakage of electricity, whereby the bitumen in which the main was laid was volatilized in the form of inflammable gas; and, after the gas had been accumulating for some time, it found its way into a house adjoining the plaintiffs' premises in the street in which the main was laid, where it ultimately exploded and caused the fire by which the plaintiffs' property was damaged.

"By a provisional order entitled the Manchester Electric Lighting Order, 1890, made by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, and confirmed by the Electric Lighting Orders Confirmation (No. 11) Act, 1890 (53 & 54 Vict. * * *) it was in substance provided that, subject to the provisions of the order and the principal Act, the corporation of Manchester, called in the order the undertakers, might supply electrical energy within the area of supply described in the order for all public and private purposes as defined by the principal Act, provided such energy should be supplied only by means of some system approved by the Board of Trade, and subject to such regulations and conditions for securing the safety of the public, and for ensuring a proper and sufficient supply of energy, as the Board of Trade might from time to time impose, and that the undertakers should not permit any part of any circuit to be

connected with earth, except so far as might be necessary for carrying out the provisions of any such regulations and conditions as aforesaid, unless such connection was for the time being approved by the Board of Trade with the concurrence of the Postmaster General, and was made in accordance with the conditions, if any, of such approval. * * *

"It appeared that the system which was adopted by the defendants for the supply of electrical energy under the order, and which had been approved by the Board of Trade, was one in which all the electric mains laid by the defendants, were linked together, and were fed at as many points as possible with electricity by cables coming from generating stations. It was alleged by the defendants that by this system it was possible to keep up a more constant pressure in the mains over the whole area of supply. The case put forward by the plaintiffs, but denied by the defendants, was that under this system it was more difficult to localize the spot at which a leakage of electricity was occurring, and remedy the same, than under a system in which the district was divided into distinct sets of mains, and that the defendants had been negligent in not taking proper steps to localize and remedy the leakage which had caused the damage.

"In answer to questions left to them by the learned judge, the jury found (1) that the system adopted by the defendants constituted a nuisance by causing danger to persons having premises adjacent to the mains; (2) that the defendants were guilty of negligence in their adoption of the method of localizing and dealing with faults; (3) that, when defendants became aware of the fault, they did not deal with it for the purpose of preventing in a reasonable and proper manner.

"Upon these findings the learned judge gave judgment for the plaintiffs for an amount agreed upon as damages.

"Collins, M. R. This is an application for judgment or a new trial in an action brought against the

corporation of Manchester, who conduct the electric lighting of the city, in respect of damage occasioned to property belonging to the plaintiffs through an explosion brought about by the operation of the system of electric lighting maintained by the defendants. The cause of the explosion was a leakage of electricity that had the effect of fusing the bitumen in which an electric main was incased, with the result that an inflammable gas was produced, which exploded and set fire to premises adjoining those of the plaintiffs.

"The first question raised for discussion is whether the defendants are protected from liability by statute. They contend that, inasmuch as they are a body endowed with statutory powers, by virtue of which they laid their electric mains in accordance with regulations prescribed by the Board of Trade, and inasmuch as no care or skill was wanting on their part, they are protected from liability by statute. On the other hand, the plaintiffs point out that by clause 70 of the Electric Lighting Order of 1890, which was confirmed by statute, it is provided that nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them. That provision raises the principal point which we have to deal with in the present case.

"The jury have answered questions left to them in such a manner as to affirm that there was negligence on the part of the defendant, which led to the accident, and judgment was given for the plaintiff on that ground as well as on the footing that the defendants were liable on the terms of the statute as for a nuisance, irrespective of any question of negligence.

"I will deal first with what seems to me to be the first and main point, which is whether the defendants are liable as for a nuisance irrespective of negligence. It has hardly been contended, though perhaps I cannot say it has not been contended, that in this case there was in point of fact no nuisance. It cannot, I think, seriously be contended that, where the premises

of an adjoining owner are blown up by an explosion brought about through the agency of the defendant's system of electric lighting, there is not a nuisance. Whether the defendants are liable in respect of it is, of course, another matter. There was an accumulation of explosive gas brought about by the fusion of the bitumen by the operation of the overheated electric wires, *which process went on for some three hours, and ultimately resulted in an explosion. If that was not a nuisance I do not know what would be one.* Therefore, there clearly having been a nuisance caused by the defendants, the question is whether the defendants are protected by any statutory provision, for otherwise their liability is clear. The statutory enactment upon which they have to rely for protection is one which contains a provision that 'nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them.' It was ingeniously argued by the counsel for the defendants that, notwithstanding the clearness of the language, it must be read subject to what they say is the underlying right of the defendants under the order to place their electric mains where they have placed them, and to the obligation imposed upon them by the order to keep a supply of electricity in those mains; that the defendants have done nothing but what they were authorized by the order to do; and therefore as I understood the argument, that the words of clause 70 of the order must be rejected, because they are consistent with the parliament provision of the order, authorizing the defendants to put their mains where they have put them, and the obligations incident to the position of the defendants as the undertakers under the order; and, that, consequently, apart from negligence, the defendants are not liable. This argument appears to me to confuse the true order of ideas. * * *

"While on the one hand the privilege is conferred upon the defendants of laying down their mains and supplying the city with electricity, on the other hand

their powers are fenced around with a provision for the benefit of the public, throwing the risk of any nuisance which may be caused by the exercise of those powers upon the undertakers. Permission is given to the defendants to do the things provided for by the order, but, if, in doing them, they occasion a nuisance, must bear the consequences. They are not given *carte blanche* to create a nuisance. If and so far as they can do the things authorized without occasioning a nuisance to anyone, they may lawfully do them; but, if and as far as they cause a nuisance by doing them, they are not only not protected by the Act, but they are made liable by its express terms." * * *

On page 607, the court said :

"I think, however, that perhaps it would be wrong not to express some opinion with regard to the question of negligence. It has been contended that there was no evidence upon which the learned judge ought to have left any question as to negligence on the part of the defendants to the jury. I have come to the conclusion that there was evidence on the question of negligence which the judge would not have been justified in withdrawing from the jury. (The Master of the Rolls then discussed the evidence as bearing on the question of negligence). It seems to me that, the obligation resting upon the defendants to use all reasonable means to secure the public against such damage as was occasioned in this case, *there was evidence fit for the consideration of the jury of failure on their part to use reasonable care in ascertaining where the source of the mischief was and remedying it when discovered.* It does not appear to me necessary under the circumstances to deal particularly with the precise form of the questions left to the jury in this case; but I wish to be understood as confirming my observations to the question of negligence on the part of the defendants in dealing with the particular mischief that arose in this case, and not as intending to deal with the broader

question whether the mere existence of the system of electric lighting adopted by the defendants in itself constituted negligence on the part of the defendants as a nuisance. I think the question put to the jury, though in terms perhaps capable of a wider meaning, were intended to be directed to the question whether the defendants were guilty of any negligence in the action which they took in reference to this particular occasion. I do not think they intended to raise the question whether the defendants' system of electric lighting of itself *ipso facto* constituted an actionable wrong. Of course there might be such a series of mischiefs arising out of a particular system of electric lighting as to lead to the presumption that the very existence of the system in itself involved such risk of mischief to the community as to constitute it as a nuisance, apart from the particular mischief happening in a particular case to an individual. I do not, however, think that the jury in this case were invited to give their verdict on the system of electric lighting adopted by the defendants, apart from the particular mischief caused to the plaintiffs. I am clearly of the opinion that upon the ground that the defendants have in law no answer to the plaintiffs' claim in respect of a nuisance occasioned to them by the defendants, the present application must fail."

Romer, L. J., in the course of his concurring opinion, said (p. 609):

"For example, express power is given (to the city) to break up the streets for the purpose of laying mains, to lay mains, and to send electricity along them; but there is no authority, either expressly, or I think impliedly, given to the defendants by the order authorizing them *to allow a leakage of electricity from their mains so as to cause an explosion, or to injure the property of the plaintiffs in the way in which they injured it. That being so, there is in my opinion an end to the case.*"

Mathew, L. J., in the course of his concurring opinion, said (p. 611):

> "I think that there was evidence for the jury that proper precautions were not taken for dealing promptly with such a contingency as occurred. But it appears to me that, upon the point of law which has been dealt with, the case for the plaintiffs is established."

Charing Cross Electricity Supply Co. v. London Hydraulic Power Co., decided July 5, 1913, by the High Court of Justice, reported in Weekly Notes of cases decided in England and Wales, in its issue of July 19, 1913, vol. 29, p. 230:

> "The plaintiffs were the owners of electric cables which had been laid under certain public streets in London; and the defendants were owners of hydraulic mains containing water subject to a high pressure. These mains burst on different occasions in four different streets, in each case damaging the plaintiff's cables. The bursting of the mains was not due to any negligence on the part of the defendants. Two of the mains which so burst had been laid under a private Act, which did not contain the usual clause that nothing in the Act should exempt the Company from liability for nuisance. The other two had been laid under a later Act which did contain that clause. The later Act also provided that the two Acts should be 'read and construed together as one Act.'"
>
> "The plaintiffs claimed the defendants were liable as for a nuisance in respect of all four of the mains."
>
> "The defendants contended that in the cases of the two first mentioned mains, the nuisance was authorized by the statute under which they were laid."
>
> "Scrutton, J., held that the effect of the two Acts being read together as one Act was to take away the privilege which, down to the passing of the later Act, the defendants had enjoyed, in respect to the two first

mentioned mains, of not being liable for damage done by their bursting in the absence of negligence; and accordingly held in the case of all four of the mains, upon the authority of Midwood & Co., Ld. v. Manchester Corporation (1905) 2 K. B., 597, that the defendants were liable as for a nuisance."

In *Brennan Construction Co. v. Cumberland*, 29 App. D. C., 554, the court held:

> "The *escape* of petroleum ~~residuum~~ residuum, which is lighter than water, into a river, from tanks above and near the banks of the river, resulting in injury to boats at a boathouse down stream, *is the proximate cause of such injury*. A person who places some potentially dangerous substance upon his property—something which, if permitted to escape, is certain to injure others—must make good the damages occasioned by the escape of such substance, regardless of the question of negligence."

In *Melker v. City of New York*, 190 N. Y., 481, the action was for personal injuries. There were two counts, one alleging negligence, which was not relied upon at the trial, and the other a nuisance, as the ground of recovery. The action involved the liability of the defendant, the City of New York, for an explosion of fireworks on Madison Avenue, adjoining Madison Square, which occurred during a political parade.

The trial court charged the jury that they should "determine whether or not the fireworks that were then exposed in the City of New York constituted a nuisance," and that if they were a nuisance the defendant was liable; the plaintiff requested the trial court to charge that the same constituted a nuisance as a matter of law, which request was denied.

"It now becomes our duty," says the court (p. 487), "to decide whether the exhibition, which resulted in a frightful disaster, was a nuisance, as a matter of law."

"For time out of mind the term 'nuisance' has been regarded as incapable of definition, so as to fit all cases, because the controlling facts are seldom alike, and each case stands on its own footing. We are not aided by the classification into public and private nuisances, because the difference between them does not depend on the nature of the thing done, but on the fact that one affects the public at large and the other a limited number only. The primary meaning of the word, suggested by its derivation, is that which injures, or in the quaint phrase of ancient times, 'that which worketh hurt.' The injury may be to person or property, to health, comfort, safety or morality. It may be a crime. Penal Code, Sec. 385. Courts of high standing have held that a nuisance at law or a nuisance *per se* exists only when the act done is a nuisance at all times and under any circumstances, regardless of location or surroundings. (Cases.) Other courts make fitness of location the standard and give controling effect to surrounding circumstances, holding certain acts not permissible as matter of law under some circumstances, but permissible under others, and under others still, not permissible if the jury find them nuisances as matter of fact. The weight of authority in this State and elsewhere is in accordance with the latter view except when the act is *malum in se*, when the surrounding circumstances have no bearing upon the question.

"We think that each case must depend on its own facts for classification as a nuisance at law, or in fact, or neither. Without attempting a general definition we are of the opinion that as applied to the facts of the case before us, if the natural tendency of the act complained of is to create danger and inflict injury upon person or property, it may properly be found a nuisance as a matter of fact; but if the act in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty it

should be held a nuisance as matter of law. While this definition lies on the border of the domain of fact, any definition of a nuisance at law must necessarily lie there, for it is a fact, but so conclusive in legal effect as to be treated as a matter of law. Locality, surroundings, methods, the degree of danger, and the custom of the country are the important factors. * * *

(P. 490) "A nuisance does not rest upon the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with the best of care. Degree implies gradation, and gradation depends on circumstances. When the degree of danger is obvious and so extreme as to invite calamity, a nuisance *per se* exists, but when the danger is so secret in nature that the cause of an accident cannot be discovered and according to all experience is neither imminent nor extreme, it is not a nuisance *per se*, although the jury may find it a nuisance in fact. * * * The circumstances of this case do not call for the hard and fast rule of a nuisance as matter of law, but for the judgment of a jury whether the occurrence was a nuisance as a matter of fact. The terrible but unprecedented result may suggest regulation or restraint by the Legislature, but it is safer for the courts, following the weight of authority throughout the country, to leave such questions to a jury, even at the risk of inconsistent verdicts, rather than to lay down a rigid and inflexible rule, less calculated to do justice in a majority of cases."

In *Rapson v. Cubitt*, 9 Meeson & Welsby's Rep., 712, the court, quoting approvingly from *Laugher v. Pointer*, 5 B. & Cr., 547, says:

"The rule of law may be, that in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors or their servants. The injuries done

upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable, when occasioned by any acts of persons whom he brings upon the premises. * * * If a man has anything to be done on his premises, he must take care to injure no man in the mode of conducting the work."

In *Johnson v. Railroad Company*, 4 App. D. C., 501, the court said:

"And neither a private nor a public corporation, neither a railroad company under pretence of service to the public, nor a municipal government, nor any agent of government, under guise of the public good, can be allowed to perpetrate that which is a nuisance to the individual specially affected by the act, and escape liability either in a court of equity or in a court of common law."

In *Palmer v. D. C.*, 26 App., D. C., 31, the appellant, the Public Printer in charge of the Government Printing Office, was convicted of violating the smoke law, and in sustaining the conviction, this court reaffirmed the Roth case, saying, at page 37:

"We have held in the case of *Roth v. District of Columbia*, 16 App. D. C., 323, that the municipality, even in the course of its performance of its governmental functions, is not entitled to perpetrate a nuisance. And the same rule will apply still more strongly to the executive officers of the Government, whose duty it is to execute and obey the laws, not to violate them."

In the *City of Winona v. Botzet*, 169 Fed., 321 (C. C. A.) the city maintained a shrill, startling steam whistle on its water-works building. This whistle was connected with its fire-alarm system, so that it gave notice, automatically by

its blasts, of fires and their location when an alarm was sent in. The city directed the engineer of its waterworks to blow this whistle daily at 5 p. m. to give notice to union men and its employes of the end of their day's work. Plaintiff's intestate was driving over a bridge about 110 feet from the whistle, at which time the assistant engineer blew a blast of the whistle, which frightened the horses, caused them to run away, resulting in the death of the driver of the horses.

The court holds that the blowing of the whistle constituted a public nuisance.

On page 332, the court says:

> "But counsel contend that the city is not liable to pay damages for the injuries inflicted by the whistle, because, in locating it and blowing it, it was exercising one of its governmental powers in the establishment and maintenance of its fire department and fire alarm system, and upon this ground that for the acts and omissions of its officers and agents in the exercise of a governmental power of this nature it is, like the State, exempt from civil liability. There is more than one answer to this argument. In the first place, if the blast of the whistle which caused the injuries had been made in the exercise of the city's power to protect against fires, it would not have been exempt from liability, because the blowing of the whistle was a public nuisance, and it was not necessary for the city to create or to continue that nuisance in order to rightly exercise its power to establish and maintain a fire department. It could have exercised that power as completely and as beneficially without locating or blowing this whistle daily within 110 feet of this bridge. If the exercise of a legislative power does not necessarily and naturally create a nuisance, but that results from the manner of exercising the power, the legislative grant is no defense to an action for the damages it causes." * * *

And again (p. 334) the court says:

> "The blast of the whistle which frightened Nichols' horses was not blown by the city in the exercise of its power to protect its inhabitants against fire and to operate its fire-alarm system or its fire department. It had no connection with or tendency to perform any of these functions."

In *Folk v. City of Milwaukee*, 108 Wis., quoted on page 13 of appellant's brief, at page 364, the court says:

> "We do not lose sight of the fact that there is another principle frequently approved by this court, namely, that a municipal corporation may not construct or maintain a nuisance in the street or upon its property to the damage of another, or negligently turn water or sewage, upon the lands of another, without liability. (Cases.) These cases all go upon the principle that the city cannot in the management of its corporate property create a nuisance injurious to the property or rights of others. In none of these cases were the city officers who were guilty of negligent or wrongful acts acting in a governmental capacity toward the person injured. In the present case, however, there can be no doubt that in the management of the schoolhouse the city officials were acting in a purely governmental capacity, as far as their relations to the deceased child were concerned. This consideration is, we think, controlling, and results in affirmance of the ruling."

In *New York Continental Jewell Filtration Co. v. Wynkoop*, 29 App. D. C., 594, a railroad company was required by Act of Congress to lay its tracks and construct a tunnel at a given place in this city. The railroad company contracted with the appellant to construct the tunnel and a nuisance resulted to the plaintiff, which was really caused by

the operation of the machinery and appliances of the defendant's plant, although the plant was not negligently, but was carefully, operated.

In denying the contention of the contractor that the acts complained of were done under proper legislative authority and requirement, and even if damage was suffered by the plaintiff, as found by the jury, it was a case of *damnum absque injuria,* this court said page 602 (quoting from a Maryland case):

> "That the excavation of the street for the tunnel was lawful, and done in a lawful manner at the time, can constitute no defense to this action, if damage actually resulted from the work. There are many cases in which an act may be perfectly lawful, in itself, and will continue to be so, until damage has been done to the property or person of another; but from the moment such arises the act becomes unlawful, and an action is maintainable for the injury."

In the English case of *Parry v. Smith,* 4 Common Pleas Division, 325, in which a defective gas fixture was put in so that the gas escaped and an explosion occurred, the court said:

> "I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of action there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract."
>
> See also *Heaven v. Pender,* 11 Q. B. D., 503.

In the *City of Chicago v. O'Brennan*, 65 Ill., 160, the plaintiff received a personal injury by the falling of a portion of the brick and plastering in a room occupied by the city as a common council room, and the court held that the liability of a city, in respect of its real property, may be for misfeasance or malfeasance, as for obstructing ancient lights, or for nonfeasance, as not taking care of premises, so as to prevent the consequences of a public nuisance.

On page 166, the court says:

> "But even if the city had been a disseisor and in possession [of the premises] as such, still if it appropriated them to public use, as shown by the evidence, it would be responsible for the consequences of a public nuisance, if it failed to take such care of them as was necessary to prevent their becoming dangerous to life or limb."

In *Ennis v. Gilder*, 32 Tex. Civ. App., 351, it was held that where a reservoir maintained by a city in connection with its water-works does constitute a nuisance, the city is liable therefor precisely as an individual, and that it constitutes no defense that the city had power to condemn the damaged land about which the plaintiff complains, but did not exercise the power.

To the same effect that a city cannot maintain its water-works if the system constitutes a nuisance, see *Wiltse v. Redwing*, 99 Minn., 255; see also *Aldworth v. Lynn*, 153 Mass., 53; *Eisenmenger v. St. Paul Water Board*, 44 Minn., 457.

In *Miles v. City of Worcester* 154 Mass., 511, the court held:

> "If a city, in adapting a lot to school purposes, builds and maintains a retaining wall between the lot and land of an adjoining owner, and, by the action of the elements or otherwise, without his fault, the wall comes

upon his land and continues there, it becomes a nuisance for which the city is responsible to such owner."

The court says (p. 512):

"It is obvious that the defendant's wall, in its present position, upon the plaintiff's land, must be deemed an actionable nuisance, unless the defendant can claim exemption from responsibility on some special ground. (Cases) The defendant suggests that it is not liable, because the wall was built and maintained solely for the public use, and with the sole view to the general benefit and under the requirements of general laws; and that the case cannot be distinguished in principle from the line of cases beginning with *Hill v. Boston*, 122 Mass., 344, and ending with *Howard v. Worcester*, 153 Mass., 426. We are not aware, however, that it has ever been held that a private nuisance to property can be justified or excused on that ground. The verdict shows a continuous occupation of the plaintiff's land by the encroachment of the defendant's wall. *The question of negligence in the building of the wall is not* material. The erection was completed, and was accepted by the defendant, and is now in the defendant's sole charge; and if it is a nuisance, the defendant is responsible. *Staple v. Spring*, 10 Mass., 72, 74. *Nichols v. Boston*, 98 Mass., 39. Such an occupation of the plaintiff's land cannot be excused for the reasons assigned. A city cannot enlarge its school grounds by taking in the land of an adjoining owner by means of a wall or fence. The public use and the general benefit will not justify such a nuisance to the property of another."

Where a municipal corporation by the use of soft coal in a newly-erected pumping station creates a nuisance and damages private premises, cannot escape liability on the ground that it is exercising a governmental function delegated to it by the State. *Gordon v. The Village of Silver Creek*, 127 App. Div. (N. Y.), 888.

In the case of *Herman v. City of Buffalo*, 143 N. Y. Supp., 205, (1913), plaintiff's intestate, an employee of a contractor doing the superstructural work on a building for the defendant, City of Buffalo, was working on the roof of same when it collapsed, causing his death. The collapse was due to an insufficient foundation. *Held*, that in order for plaintiff to recover on the trial that the foundation was a nuisance, the foundation must have been so obviously dangerous, and of such a character as to render the structure a menace and an impending danger to persons in the enjoyment of their legal rights.

Evidence in an action for the death of an employee of a contractor who was doing the superstructural work on a building for the City of Buffalo, caused by the collapse of the building, held to sustain a finding that the foundation was so insecure and dangerous as to constitute a nuisance. The contract between the City of Buffalo and the principal contractor for the erection of a building provided that the principal contractor could not sublet the work without the consent of the City. The principal contractor did sublet the contract for roofing without such consent. An employee of the subcontractor was killed when the building collapsed, because of a defective foundation. *Held*, that whether the City had formally given its consent or not, as the employee was there with the knowledge of the officers of the City, it would be assumed that he was rightfully there, and with their implied invitation, so as to render the City liable for its negligence whereby he was killed.

The court says, page 206:

> "The plaintiff's intestate was at work upon the roof of a new pumping station engine house, which was being constructed for the City of Buffalo. The building collapsed, and he was killed. The accident occurred

June 30, 1911, and the building was nearly complete when it fell. The action is for his death; it being contended that the building was obviously insecure and dangerous, and a nuisance."

The plaintiff recovered against the City of Buffalo.

"It is contended," says the court, "that the building fell because the east foundation wall of the building was not sufficiently strong nor secure to withstand the lateral pressure against it; that the wall was crowded inward, carrying with it the superstructure sufficiently to weaken the trusses which supported the roof; that the trusses were put out of alignment and bowed or buckled, and the lower chords put out of tension, thus weakening the trusses so that they were unable to carry the load which was put upon them, and the roof fell, and the building collapsed. The land upon which the building was located was a part of the park system of the City. The Park Commissioners consented to the erection of the pumping station thereon, as they were permitted to do (Laws of 1905, c. 111), and named Robert A. Wallace, as architect and superintendent of construction for the building. He was so recognized by the Commissioner of Public Works, and acted in that capacity. * * *

"It may also be stated, in passing, that the basis of making some of the contractors and subcontractors parties defendant is, in brief, that they having knowledge of the insecurity of the foundation, proceeded with their work, and thereby further weakened the foundation and enhanced the danger, upon the principle that whoever participates in the construction of any structure which is obviously dangerous to human life is a party to the creation of a nuisance. But, as has been stated, the jury exonerated them from fault.

"The judge in his charge to the jury, after stating the principle which I have just mentioned, continued by saying that the structure must, however, be so threatening as to constitute an impending danger to

persons in the enjoyment of their legitimate rights; that the plaintiff, in order to recover against any defendant in this action, is bound to show by evidence, to the satisfaction of the jury, that there was some defect in such defendant's work, which as a reasonably prudent man he knew, or should have known, was of such a character as to render the structure a menace or danger to human life, one that was obviously dangerous to human life, one so threatening as to constitute an impending danger to persons in the enjoyment of their legitimate rights. The rule thus laid down by the learned trial judge for determining the defendant's liability is as stated in *Cochran v. Sess*, 168 N. Y., 372, 61 N. E., 639, and almost in the identical words of Judge O'Brien, who wrote for the court in that case.

"It is true that the defendant's negligence lies at the foundation of this action, but the nature of the action is one essential for creating and maintaining a nuisance. As is said by Mr. Justice Woodward in *McNulty v. Ludwig & Co.*, 153 App. Div., 206, 213:

" 'The existence of a nuisance, in many, if not in most instances, presupposes negligence. That is torts may be, and frequently are, coexisting, and practically inseparable, as when the same acts or omissions constituting negligence, give rise to a nuisance.

"I will not collate the cases upon the question of what constitutes a nuisance, or attempt to point out the limitations of the general definition, by which courts have attempted to define a nuisance. It is sufficient, I think, to say that in my judgment, the rule stated to the jury was applicable to this case, and that upon the evidence the jury was warranted in finding the defendant City liable."

* * * * * * * * *

Again, the court says, on page 210:

"But it is contended on behalf of the City that the plaintiff's intestate was at most a licensee upon the premises, and that the city owed him no active duty to

have the building or premises in any particular condition, or to do, or refrain from doing any particular act, except not to wilfully injure him.

"It appears that the Crooker Company, the principal contractor for the superstructure, subcontracted the sheet-metal work and roofing to G. H. Peters Company, and the plaintiff's intestate seems to have been doing his work under some arrangement with the Peters Company. He had several men working with him slating the roof of the building when it collapsed. It is urged, that under the terms of the contract between the Crooker Company and the City the Crooker Company could not sublet the work without the consent of the City. The record is silent upon the question of whether the City consented or not. But, whether the City formally gave its consent or not, I think we may fairly assume that he was rightfully there, engaged in doing his work, during the completion of the building, and that the work which he was doing was included in the general contract between the Crooker Company and the City; that the City, through its proper officers so recognized his status; and that at least he was there by the implied invitation of the City. Under such circumstances, I think the City is liable for his death, assuming, of course, that the other necessary facts have been established."

In the case of *Hogle v. Franklin Mfg. Co.* 199 N. Y., 388, affirming S. C. in 128 App. Div., 403, the cause of action rested both on negligence and nuisance, and no request was made at the trial that plaintiff should elect. The evidence showed that a piece of iron which injured the plaintiff was maliciously thrown from the window of the defendant's factory, by one of its workmen, and that it had been the practice of its workmen, maliciously, or in a spirit of mischief, to throw similar objects from the windows, upon the premises adjoining, where the plaintiff lived, with the knowledge of the defendant, but without its consent,

and in violation of its orders. A piece of iron was thrown, injuring the plaintiff. The court said:

> "A judgment for the plaintiff may be sustained upon either ground stated in the complaint. The court further holds that the defendant's liability upon the ground of negligence rests not on the throwing of the missiles, as they were not thrown in furtherance of its business, but upon the fact that the defendant, though having knowledge of the facts, failed to use reasonable care to prevent them being thrown; and that the defendant's liability upon the ground of nuisance rests upon the principle that it is the duty of the owner of premises to prevent them from being a constant source of injury to others; and that if while in full possession and control of his premises he knows that an evil, injurious to others, exists thereon, and he does not abate it within a reasonable time, and under reasonable circumstances, he is guilty of suffering a nuisance to continue, and is liable for the injury resulting therefrom, without proof of negligence of its incidents."

On page 392 the court says:

> "While we all think that the recovery should be sustained, we differ somewhat as to the exact theory upon which it should be based. No request that the plaintiff should elect between the theory of a nuisance and that of negligence was made at the trial, and the complaint was adapted to either. The trial judge did not name the action, but treated it as an action on the case."

On page 395 the court says:

> "I am personally of the opinion, however, that the practice complained of was a nuisance, as a matter of fact, if the jury so found, *sic utere tuo alienum non laedas* is an old maxim of the law which applies both

to the use made and the use knowingly suffered to be made of one's own property while he is in full control thereof."

On page 396 the court says:

"The decaying carcasses of animals, whether placed on the land by the owner or not, hog pens, cesspools, dangerous structures, explosives, and the like, while all are dependent upon the surrounding circumstances, and on the degree of danger or annoyance, may be found nuisances in fact, although the mere ownership of land may impose no liability for a nuisance thereon, or committed therefrom, still if one suffers his premises to become the standpoint for the habitual infliction of injuries upon his neighbor, and such injuries could not be inflicted without standing on such land, he may be held liable by a jury as principal. He suffers the evil to exist on his land, if, while in the full possession and control thereof, he knows that it exists thereon, and he does not abate it within a reasonable time, and under reasonable circumstances, both time and circumstances ordinarily being for the jury."

"I think, that upon the facts as they are presumed to have been found by the jury, the defendant was guilty of suffering a nuisance to exist and continue on its premises, and that it is liable for the injury resulting therefrom to the plaintiff, without proof of negligence or its incidents."

In the case of *Hines v. The City of Rocky Mount*, 78 S. E., 510 (N. C.), it is held "that municipal corporations may not be held liable to individuals for failure to perform, or neglect in performing, duties governmental in their nature, is subject to the limitation that neither a municipal corporation nor other governmental agency may establish and maintain a nuisance causing appreciable damage to the property of a private owner, without being liable therefor."

In 2 Wood on Nuisances (3rd Ed.), Sec. 561, page 756, it is said that—"The right to have the air float over one's premises free from all unnatural or artificial impurities is a right as absolute as the right to the soil itself."

In *Haag v. Board of Commissioners*, 60 Ind., 511, it is held to be a "well recognized rule that municipal corporations are liable for torts in certain classes of cases, including nuisances, in the same manner as natural persons."

2 Addison on Torts, D. & R. Ed., p. 315: "A municipal corporation has no more right to maintain a nuisance than an individual would have, and for a nuisance maintained upon its property the same liability attaches against a city as to an individual."

In *Harper v. City of Milwaukee*, 30 Wis., 365, it is said:

> "The general rule of law is that a municipal corporation has no more right to erect and maintain a nuisance than a private individual possesses, and an action may be maintained against such corporation for injuries occasioned by a nuisance for which it is responsible, in any case in which, under like circumstances, an action could be maintained against an individual.
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> *Pittsburgh City v. Grier*, 22 Pa., 54;
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> *Brower v. Mayor, etc., of New York*, 3 Barb. (N. Y.), 254;
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> *Young v. Leedom*, 67 Pa. 351;
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> *Delmonico v. Mayor, etc., of New York*, 1 Sandf., 222;
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> are a few of the numerous cases which assert or recognize this principle."

Laflin & Rand Powder Co. v. Tearney, 131 Ill. Rep., 323. If the facts alleged in the declaration of themselves constitute a nuisance, it is not necessary to further characterize them by the use of the word "nuisance." As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance,

Hardy v. The City of Brooklyn, 90 N. Y., 435, was an action for damages resulting from a nuisance alleged to have been caused by the negligent construction of a sewer. It appeared that by the plan of the sewer as adopted and filed by the board of water commissioners, it ran past the plaintiff's premises to a point where it would find a proper discharge. The sewer was constructed to a point a short distance above the plaintiff's premises, and then a wooden trough or chute was built to carry off its contents, in consequence of which noxious and deadly gases were emitted, injuriously affecting plaintiff's premises. Held, a nuisance was created for which the city was liable.

In *Shuter v. The City*, 3 Phila., 228, the court says:

> "But it does not follow that because a municipal corporation has the right to become the owner of an adjoining lot for some public purposes, that they have a right to erect a nuisance on it."

Briegel v. City of Philadelphia, 135 Pa. St., 451, a recovery was sustained for injuries to the houses of the plaintiff, alleged to have been caused by the negligence of the city in not properly constructing the plumbing and drainage connected with the privy well of a public school building owned and maintained by the city. The court held that:

> "A municipal corporation, owning and holding property for public purposes, is as much subject to the usual rule, *sic utere tuo ut alienum non laedas, as are* private citizens, and is liable to an adjoining owner for injuries arising from a nuisance maintained upon its property: *Shuter v. Philadelphia*, 3 Phila., 228, approved.
>
> "(a) Under local statutes, the public schools in the City of Philadelphia are maintained by means of appropriations made by councils out of taxes levied and

collected by the city. A defectively constructed privy well, maintained upon city property used for public school purposes, created a nuisance to the injury of an adjoining owner.

"2. In such a case, the city is liable for the injury by virtue of its ownership of the premises: *Ford v. School Dist.*, 121 Pa., 543, and *Erie School Dist. v. Fuess*, 98 Pa., 600, distinguished, on the ground that the action in the present case was against a municipal corporation proper, and the injury complained of was a nuisance arising from the negligent use of city property."

The court says (p. 459):

"The ownership of property entails certain burdens, one of which is the obligation of care that it shall not injure others in their property or persons, by unlawful use or neglect. This obligation rests, without regard to personal disabilities, on all owners alike, infants, *femes covert*, and others, by virtue of their ownership, and municipal corporations are not exempt. The general rule is thus stated: 'Municipal corporations are liable for the improper management and use of their property, to the same extent and in the same manner as private corporations and natural persons. Unless acting under valid special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another.' 2 Dillon Mun. Corp., 3d ed., Sec. 985. The particular quesion here involved does not seem to have been before this court, but it was expressly decided in *Shuter v. Philadelphia*, 3 Phila., 228, by Judge Sharswood, when president of the District Court: 'The municipal corporation owning and occupying property for public purposes is as much subject as a private citizen to the usual rule, *sic utere tuo ut alienum non laedes*. The city is as much bound as an individual owner of a lot, to find an outlet for the water on it, without encroaching on his neighbor.' We adopt this as a correct exposition of the law."

In the case of *The Mayor, etc., of New York v. Bailey*, 2 Denio, 433, approved by the Supreme Court of the United States in *Barnes v. D. C.*, 91 U. S., 552, the action was trespass on the case against the corporation of the City of New York for negligence in constructing the dam across the Croton River, where that stream is diverted for the purpose of supplying the City of New York with water, in so unskilful a manner, that on the occasion of a freshet in the river occurring after its erection, the dam was swept away, and plaintiff's buildings and property situated below on the stream were carried off and destroyed.

The defendants contended that the action could not be maintained because the work in question was constructed by the *water commissioners* appointed by the Governor and Senate, and not by or under the control of the defendant; that defendants acted as public agents in all that they had done in respect to the work in question, and for that reason were not responsible.

These contentions were denied, the court saying, (page 443):

> "There is a class of cases, however, in which an action upon the case for damages may be maintained against a party for an injury sustained by another, by the wrongful act of a third person, although the relation of principal and agent, or of master and servant, did not exist between the defendant and the person whose wrongful act caused damage to the plaintiff. The case of *Bush v. Steinman* (1 Bos. & Pull. 404) which was referred to upon the argument, belongs to this class of cases. There the defendant had become the purchaser of a dilapidated house by the wayside, but which he had never occupied. He contracted with a surveyor of buildings to repair such house. The surveyor contracted with a carpenter to do the whole labor and to furnish materials; the latter contracted

with a mason for a part of the job, and he agreed with a lime burner to furnish and deliver the lime. The lime burner's servant brought the lime and deposited it in the highway in front of defendant's house; in consequence of which deposit the plaintiff and his wife, in passing along the highway, were overturned and injured." * * *

"The Court of Common Pleas appears to have based its decision in that case upon the ground that the owner of the premises was answerable for the nuisance he had suffered to remain in front of his building, and between it and the middle of the highway to which his premises presumptively extended. Rooke, Justice, says a man who has work going on upon his own premises and for his own benefit must be civilly answerable for those whom he employs; that it shall be intended by the court that he has control over those who work upon his premises, and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own; that he ought to reserve such control, and if he deprives himself of it, the law will not permit him to take advantage of that circumstance in order to screen himself from an action. That principle applied to the present case will render the corporation of the City of New York liable for the improper construction of its Croton dam, by, or under the authority of the water commissioners, for the benefit of, and on the premises owned by that corporation."

"By the fourteenth section of the act of May, 1834, the title of the property taken by the water commissioners for the purposes of that act is declared to be vested in the city corporation. The dam and the aqueduct must, therefore, be considered the property of the defendants in the courts below. And if a dam

which was a nuisance, was allowed to be erected and to remain upon the premises, the owner of such premises, the corporation of New York, is properly answerable for the damage which others have sustained thereby. It is true the corporation had no control over the water commissioners, nor over the engineers or contractors employed by them. But the act of the Legislature did not allow the water commissioners to go on with the work, at the risk and expense of the corporation, until the latter had instructed them to proceed. Such instruction having been given, however, the corporation, as owner of the premises on which the dam was erected and maintained, must be answerable if its dam, which was subsequently erected under the direction of those commissioners, became a nuisance and produced injury to the owners of property on the stream below.

"Again: by the general principles of the common law, the owner or occupier of premises was liable for any nuisances upon such premises, on the ground that he was bound to control the use of his property, and to use it in such a manner as not to produce injury to others. And if the owner of land allows others to erect nuisances thereon, or suffers his premises to be in such a situation as to produce injury to others, he is answerable for such injury, * * * It is upon the ground that the dam was the property of the corporation and that such corporation was legally bound to see that its corporate property was not used by any one so as to become noxious to the occupiers of property on the river below, and that the judgment in this case must be sustained if it can be sustained at all. And upon that ground, though I confess with some hesitation, I shall assent to the affirmance of the court below."

In *Emory v. Hazard Powder Company*, 22 S. C., 478, the cause of action alleged was that the defendant had erected upon its premises a powder magazine, within two

hundred yards of the plaintiff's dwelling and within twenty-five feet of the road leading to a shipyard, in which magazine the defendant intended to keep in store large quantities of gunpowder. The plaintiff charged that the erection and maintaining of a powder magazine, on defendant's premises, greatly endangered the lives of herself, her family and servants from explosion, and also the lives and property of the public traveling on said road. The plaintiff recovered, and in affirming the judgment, the court said, p. 482:

> "The main question in the case was of fact, and that was whether the magazine endangered the lives of the plaintiff, her family, and servants, residing on her own premises. The judge charged that if, from the evidence the jury found that it did, then the action could be maintained as for a nuisance. No objection was made to this portion of the charge, and if this be good law, as no doubt it is, we do not see how the the judge could have modified it as requested in this exception. It is not the number of persons affected by a matter that makes it a nuisance, but it is its injurious, offensive, and noxious character; and it is none the less a nuisance because it affects only one or two instead of a multitude. There may be a private as well as a public nuisance, the distinction being dependent upon the number affected, but the fact of nuisance itself does not depend upon number."

The question of nuisance or no nuisance is one of fact exclusively for the jury. *Hickerson v. U. S.*, 2 H. & H., 228 (D. C.).

In *Sanford v. D. C.*, 24 App. D. C., 404, the court holds that the occupation of a middle of a street adjacent a market house in the City of Washington, by a wagon and country produce, constitutes a palpable nuisance.

The duty to see that no nuisance is created or maintained resting upon the owner of real estate can not be delegated.

Norwalk Gaslight Co. v. Norwalk, 63 Conn., 495.
James v. McMinimy, 93 Ky., 471.
Hughes v. Cin., etc. R. Co., 39 Ohio St., 476.
Tarry v. Ashton, 1 Q. B. D., 314.

Where one person employs another to furnish the materials and do a specific job of work as an independent contractor, he does not thereby render himself liable for injuries caused by the sole negligence of such contractor or his servants. There is a well-recognized exception to such general rule, to the effect that where the performance of such contract, in the ordinary mode of doing the work, necessarily or naturally results in producing the defect or nuisance which causes the injury, then the employer is subject to the same liability to the injured party as the contractor. *Chicago v. Robins*, 2 Black, 418, S. C., 4 Wallace, 657.

In *Fowler v. Saks*, 18 D. C. Rep. (7 Mackey), 584, the court quotes from Cooley on Torts, (pages 547-8) as follows:

> "In general," it is said, "it is entirely competent for one having any particular work to be performed to enter into an agreement with an independent contractor to take charge of and do the whole work, employing his own assistants and being responsible only for the completion of the work as agreed. The exceptions to this statement are the following: He must not contract for that the necessary or probable effect of which would be to injure others, and he cannot, by any contract, relieve himself of duties resting upon him as an owner of real estate, nor to do or suffer to be done upon it that which will constitute a nuisance, and therefore an invasion of the rights of others. * * *

"Where defendant, for his own use, stored on his own land petroleum, which escaped on the premises of his neighbors, he is liable for the damages without proof of negligence on his part. *Berger v. Minneapolis Gaslight Co.*, 60 Minn., 296.

"An injury caused by persons constructing a work under authority of law may be actionable as a nuisance." *Delaware & R. Canal Co., v. Lee*, 22 N. J. L., 243.

When a municipal corporation has ample power to remove a nuisance that is injurious to health, endangers the safety or impairs the convenience of its citizens, or when in the prosecution of a public work it creates a nuisance, or permits it to remain, it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it, and for the injuries resulting from its unlawful acts. *City of Fort Worth v. Crawford* (Tex.), 12 S. W., 53.

In Joyce on the Law of Nuisances, Sec. 353, it is said:

"A municipal corporation is subject to liability like an individual for a nuisance which it maintains or permits to be maintained upon property owned by it, or under its control. It may in a particular case be relieved from liability as for a nuisance where it acts under express legislative authority in the doing of an act strictly within the scope of the powers granted. Such authority, however, will not relieve a municipality from liability for a nuisance created by it in the careless, negligent, or improper exercise of the powers conferred." (Cases).

* * * * * * * * *

Sec. 355, Joyce on the Law of Nuisances, states:

"Though a municipality is engaged in the construction or maintenance of a work which is for the public benefit, use or charge, such fact will not relieve it from

liability for a nuisance caused by the mode or manner of its construction or maintenance. A municipality in pursuing a public work is not privileged to commit a nuisance to the special injury of a citizen, and if it does, it must, as would a private individual, respond in damages therefor. *Chattanooga v. Dowling*, 101 Tenn., 342.

"In an action against a gas company for maintaining a nuisance by creating noxious odors, the existence of the nuisance establishes a cause of action, and it is not necessary to prove negligence on the part of the company in the selection of its machinery or in its methods of manufacture. *Bohan v. Port Jervis Gaslight Company*, 122 N. Y., 18.

In *Harper v. City of Milwaukee*, 30 Wis., 365, the board of public works had full and complete control of the mode and manner of the performance of the work (laying a sewer) by the contractor during the progress thereof, and the contract was not, therefore, an independent one, but the city, through its board of public works, retained control and direction of the work, the court holds; and, further, that the city was liable for a nuisance created.

(e) Defendant liable for negligence causing nuisance in escape of gas because in exercise of non-governmental function.

In *Roth v. District of Columbia* (1900), 16 App. D. C. 323, the court held that:

"The Metropolitan police of the District of Columbia is a branch of the municipal organization of the District, subject to the control of the municipality and for the acts of which the municipality is liable; *construing* section 6 of the act of Congress of June 11, 1878 (20 Stat. 102), establishing a permanent form of government for the District.

"While the mere maintenance or location of a police ambulance stable by a municipality may not of itself be a nuisance, since it is a necessary and proper appliance of governmental authority, its maintenance in a negligent, improper and unlawful manner is not warranted by any requirement of governmental duty, and for maintenance the municipality is liable in damages.

"Where by law the District of Columbia is the owner of a police ambulance stable, the municipality is, as owner charged with the duty of keeping it in proper condition, and is liable in damages if it permits it to become a nuisance, whether it derives any profit from the maintenance of the stable or not."

~~The ruling of this court in the *Roth* case is so exceedingly familiar as not to require elaboration in this brief.~~

In *Johnston v. District of Columbia*, 118 U. S. 19, the court says:

"The duties of the municipal authorities in adopting a general plan of drainage and determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory, and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. *But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured.*"

In the case of *Bowden v. City of Kansas City*, 69 Kansas, 587 (1904), the court held that

> "A municipal corporation is performing a ministerial public duty in maintaining a fire station, and is liable in damages to an employee for personal injuries resulting from the neglect of the corporation to furnish him a reasonably safe place in which to work."

The plaintiff was in charge of a fire engine station in which were kept a hosecart and horses for drawing it; that it was his duty to clasp the collar on the horses when they dashed from their stalls to the tongue of the hosecart upon the alarm of fire. The floor between where the horses stood and the tongue of this cart, which had been laid with wooden blocks, had become so worn and rotted that a large hole had been made in the runway, which the city had negligently permitted to remain for a long time, notwithstanding the fact that the atention of the fire marshal had frequently been called to it and he had promised to cause it to be repaired. On the occasion of plaintiff's injury he was in the discharge of his duties when a fire alarm was turned in and one of the horses made a dash for the tongue of the hose-cart, where plaintiff was waiting to receive it to clasp the collar of the harness, the horse stumbled into the hole, falling heavily against plaintiff, which resulted in serious injuries to him, for which he sued the city.

"The liability," says the court, "springs from the duty which is due from every person, whether natural or artificial, to exercise such reasonable care and management of his property that it will not unnecessarily result in injury to another. A municipal corporation in control of public property is not exempt from this rule when discharging a municipal duty. Mr. Jones, at section 150 of his work on Negligence of Municipal Corporations says:

"'The obligation to exercise case does not arise between individuals because one pays money to another and is therefore entitled to its exercise. It springs, as has been said, from the right of personal safety, and is wholly removed from the question of pecuniary profit. So between corporations, whether public or private, and individuals, the duty is not dependent upon the payment of money. It comes into existence from the same right of personal safety, And it is not consistent with principle to hold that a duty exists to exercise care in respect to remunerative public property, but that no such obligation arises in respect to public property from which no income is derived.

"'Moreover, the weight of authority does not justify a distinction of this character. And an examination of the cases upon this question will sustain the conclusion that municipal corporations are responsible in damages for all injuries occasioned by their negligence in the management or care of public property, irrespective of the question whether an income is derived from it.'

"In the care and management of the fire station the city was performing a purely ministerial duty. It was incumbent upon it to furnish its employees in charge of this property a safe place in which to work, and if the plaintiff was injured through the negligence of the city's agents in failing to perform this duty it was liable for such injuries."

In *The Rochester White Lead Co. v. The City of Rochester*, 3 N. Y., 466, a recovery was sustained for an injury to the plaintiff's factory and to a quantity of white lead situated therein, occasioned by the negligence of the city in the construction of a culvert.

"The principal question is," says the court (p. 466), "whether the corporation of a city is exempt, in consequence of any immunity inherent in their municipal charter, from those liabilities for malfeasance, for which individuals and other corporations would be liable in a civil action, by the party injured.

"A good deal of obscurity has, in times past, rested upon this subject, arising from the incident that some duties of such corporations are judicial in their nature, while others purely ministerial have to be executed by them; and these duties sometimes so mingle as not to be easily distinguished from each other. Wherever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action, for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done.

"But this judicial immunity can be extended no further. The civil remedy depends exclusively upon the nature of the duty which has been violated. *When duties which are purely ministerial are [illegible] upon officers whose chief functions are judicial [illegible] ministerial duty is violated, the officer, alt[illegible] most purposes a judge, is still civilly r[illegible] such misconduct.*

"The charter of the city of B[illegible] upon the common council 'power to [illegible] common sewers drains, vaults, and bridges to be made in any part of the city.' The ordinance of the common council directing such public improvements is judicial in its nature, and extends immunity from private action for damages to those who perform the duty. *But there their immunity ends. The further prosecution of the work is purely of a ministerial character; the agents to perform it are of their own selection, and they are bound to see to it that it is done in a safe and skilful manner.*"

* * * In *Martin v. Mayor, etc., of Brooklyn* (1 Hill, 545) the decision is placed by the judge upon the ground that the act complained of was judicial and not ministerial. In the course of his opinion, Cowan, J., says: "I speak not

of private corporations, nor of turnpike companies, who are certainly liable for their agents' omissions to keep their road in repair. I concede the liability also of municipal corporations for like omissions, *where the duty of repair, or the like, is absolute, and due from them as a corporation* (Mayor of Lynn v. Turner, Cowp. 86). * * *

> "It is the duty of a municipal corporation to build a sewer, so that it shall not become a nuisance, to the neighborhood, as much as it is to avoid the same result, by keeping it in repair, after it has been built. (People v. Corp. of Albany, 11 Wend., 543)."

In the case of *Finson v. The City of Topeka*, 87 Kansas Rep. 87 (1912), the syllabus is:

> "Plaintiff's husband, while in the employ of a city as a laborer, was killed by an explosion of natural gas in a fire cistern belonging to the city, in which he was at work. The gas escaped into the cistern by reason of defective gas mains in the city streets maintained by a gas company operating under a franchise granted by the city. There was evidence tending to show that the city was negligent in permitting the gas to escape into and remain in the cistern. Held, that an action in damages may be maintained against the city for such wrongful death.
>
> "The liability of the city in such a case rests wholly upon its neglect of the master's duty to furnish the servant a reasonably safe place in which to work. * * *
>
> "There was evidence tending to show that the immediate cause of the explosion was the act of another employee of the city who struck a match for the purpose of lighting a cigar. The proximate cause of the injuries resulting from the explosion, is held to be the negligence in permitting the gas to escape into and remain in the cistern. Where dangerous gases are thus confined an explosion is regarded as a natural and probable consequence which might reasonably have been foreseen."

The plaintiff brought the action to recover damages from the City of Topeka for the death of her husband, who died as a result of injuries received in an explosion in a fire cistern of the city, in which he was at work as a laborer in the street department of the city. The cistern where the accident occurred was located beneath the surface of the street. It had become out of repair, and the walls were cracked and broken. Plaintiff's intestate, with four others, including the city street commissioner, went down into the cistern for the purpose of cleaning it out and repairing the walls. The evidence showed that shortly after they entered the cistern the street commissioner struck a match to light his cigar, which caused an explosion of gas that had accumulated in the cistern and several of the workmen were injured, including plaintiff's husband, whose injuries resulted soon after in his death. For many years previous to the explosion a gas main had been located in West Seventh street, across the street from the fire cistern. It had been for some years maintained and operated by a gas company under a franchise granted by the city as a part of a system for supplying natural gas to the city and private consumers. Soon after the explosion occurred, the gas company uncovered a large part of this main, and it was found to be in a broken and defective condition; and the service pipes attached thereto were found to be rusted out and perforated with holes so that in many places large quantities of natural gas were escaping therefrom.

> "Complaint is made," says the appellate court, "because the court sustained a demurrer to the second defense in the answer, wherein the city alleged that the accident was caused by the gross negligence of the gas company in failing to keep its system of gas mains and service pipes in proper condition. This may be considered in connection with the principal contention of the city, which is that its relation to the mains and

pipes of the gas company is strictly governmental. It is claimed that in granting the franchise to the gas company the city exercised merely a function of government, that the company is in no sense its agent and the city cannot be held liable for the torts of the company; and that the latter alone is liable for damages resulting to persons or property from the failure to repair its pipes and mains. It is said that while the city might, through the exercise of its police power, require a gas company operating within the city and using the city to adopt reasonable regulations for the protection of life and property, the law is well settled that no action will lie against a city for damages for the exercise or nonexercise of such a power. In this connection, it is urged that the city had no private interest in the granting of the franchise and received no benefit or profit from the business conducted thereunder. Relying upon these propositions, it is insisted that upon showing that the explosion resulted from the negligence of the gas company, the city was absolved from any liability, to plaintiff, and, therefore, that the court erred in sustaining the demurrer and in giving a certain instruction which will be referred to later.

"This court, in a number of decisions has recognized the two-fold functions exercised by cities, and has approved the general doctrine contended for by the defendant. In granting the franchise to the gas company, the city exercised a purely governmental or political function, and could not be held liable for the consequences of its exercising such power or for any failure to exercise its police power by requiring the gas company to keep its mains in repair. (cases). The action cannot be predicated upon the exercise by the city of governmental power in granting the franchise, or upon its failure to require the gas company to keep its mains in repair. It is true that a large part of plaintiff's evidence was offered to show the defective condition and lack of repair in the pipes and mains of the gas company, and it may have been offered by plaintiff partly upon the theory that the city is liable for its fail-

ure to require the gas company to repair the defective pipes and mains. The evidence was competent and relevant only for the purpose of showing notice to the city of the dangerous condition of the cistern. The liability of the city springs solely from the neglect of its duty as an employer to furnish its employee a reasonably safe place in which to work.* * *

"No matter where the gas came from, if, through the negligence of the city it was permitted to remain in the cistern and injure a workman, the city would be liable to the same extent that any employer would be under the same circumstances. It would have been equally liable upon the facts shown in the evidence if the cistern had filled with sewer gas, or with natural or artificial gas that had leaked from pipes of some manufacturing establishment. If any kind of highly inflammable gas had been allowed to accumulate in the cistern, or if dynamite or any dangerous explosive had been placed there by any person, and the city had been shown to have been negligent in allowing it to remain, or in sending its employees there to work, and an explosion had occurred which caused an injury to the workmen without their fault, the city would have been liable for the damages occasioned by the master's duty. That a municipal corporation is liable to an employee for injuries resulting from its neglect to furnish him a reasonably safe place in which to work was decided in *Emporia v. Kowalski*, 66 Kan., 64; *Bowden v. Kansas City*, 69 Kan., 587; *Roberts v. St. Mary's*, 86 Kan., 403."

No claim was made in the petition that liability existed because the defective gas mains and the cistern were in the street. Upon this point the court says (p. 91):

"Besides, as the injury did not happen to anyone using the street as a thoroughfare or public place, the fact that the cistern and the defective pipes were in a street adds nothing to the liability of the defendant. If the fire cistern had been located away from a street

upon a lot belonging to or used by the city and it had permitted the cistern to fill with inflammable gas and had negligently sent its workmen there under the same circumstances, it would be liable.

"The city makes the further contention that the proximate cause of the explosion was the negligent act of the superintendent of streets in striking a match to light a cigar and that he was not acting at the time within the scope of his employment. Where gas of such highly inflammable character as to be liable to explode when brought into contact with fire is negligently allowed to escape into a confined place like a room or cistern, the proximate cause of its explosion is held to be the negligent act of permitting the gas to escape into and to remain in such a place. An explosion of subtle and dangerous gases when thus confined is regarded as the natural and probable consequence which might reasonably have been foreseen" (cases).

The judgment in favor of the plaintiff was affirmed.

It is held in the case of *Stevens v. United Gas & Electric Co.*, 73 N. H., 159, that "one who maintains upon his premises a line of defectively insulated wires charged with an electric current of high voltage is bound to exercise reasonable care for the protection of his invitees who are exposed to contact therewith;" that the servants of an independent contractor are deemed to be upon the premises of the proprietor by his implied invitation.

On page 168, the court says:

"'Roundly stated,' the rule is, 'that the relation of master and servant does not subsist between the proprietor and the servant of the contractor; and therefore those obligations which the law imposes upon the master for the protection of one injured while in his service do not rest upon the proprietor, but upon the contractor. On the other hand, the servant of the contractor must be deemed to be upon the premises of the proprietor by his invitation, express or implied; and therefore he owes him the same duty of guarding him against the consequences of hidden dangers on the

premises, that a proprietor would in any case owe to a guest, a customer, or other person coming, by invitation, upon his premises.' I Thompson Commentaries on the law of Negligence, s. 680. The same author also says (s. 979): 'It is not necessary to suggest that where a proprietor engages an independent contractor to do work upon his premises, the contractor, while executing the work, will be there in pursuance of the invitation of the proprietor, and the proprietor will * * * be under the duty of exercising ordinary or reasonable care to the end of promoting his safety. In almost every such case there is the further implication, that if the contractor brings third persons, his own employes, his partners, or assistants, to assist him in executing the contract, such persons are presumably upon the premises by the invitation of the owner, and he owes to them the same measure of care, to the end of promoting their safety, that he owes to the contractor himself,—and this, although no contractual relation exists between the proprietor and them. See, also, Coughtry v. Woolen Co., 56 N. Y., 124; John Spry Lumber Co. v. Duggan, 80 Ill. App., 394, 398; Johnson v. Spear, 76 Mich., 139, 143; Brannock v. Elmore, 114 Mo., 55; Holmes v. Railway, L. R. 4 Exchequer, 254; Beach Cont. Neg., s. 51."

Numerous other authorities are cited and quoted from by the court.

In *Johnson v. Spear*, 76 Mich. 143, the plaintiff was not employed by the defendant.

"It does not follow, however," says the court (p. 143) "that the defendant is not liable for injuries which may be received by those persons employed by his contractor to unload vessels at his dock. If the injuries result from negligence of the defendant while work is being done upon his premises, and through his fault in not keeping them in a suitable and safe condition, he is liable to any servants of the contractor for

injuries resulting to them from defects therein; not because there is any contract obligation between the parties, but arising out of his obligation or duty to provide safe appliances for the servants of the contractor to use, or to keep his premises upon which such servants are at work i na reasonably safe condition, whether the contract provides for it or not. Wood, Master & Servant, p. 699, Sec. 337; Coughtry v. Woolen Co., 56 N. Y., 124; Bower v. Peate, L. R. 1, Q. B. Div., 321, 328. * * *

"It is analogous to that class of cases where the owner of real property is held liable to any one who, expressly or impliedly invited upon his premises, is injured by a concealed defect" (cases).

In *Smoot v. Mayor of Wetumpka*, 24 Ala., 116, where a bridge was part of a street, and became unsafe, and the city failed to destroy it as a nuisance or repair it, and damages were sustained by a traveler by reason of its defective condition, the court, in holding the city liable, said:

"The tendency of modern decisions is to hold corporations liable like individuals for tortious violations of duty not involving governmental powers, and to disregard the distinction which has sometimes been taken between what is termed misfeasance and non-feasance. We are of opinion that there is, in such cases, no solid distinction between tortious neglect of a known defined duty, which is of such character as not to involve governmental powers, and the performance of such a duty in so unskilful and negligent a manner as to cause particular or extraordinary injury to another. The consequences to the party injured are the same whether they result from misfeasance or non-misfeasance."

Wood on Master & Servant, sec. 337 (2d Ed), lays down the ruie:

"Although a contractee is not in general liable to the employees of the contractor for injuries resulting to

them while engaged in his work under the control of such contractors, yet in the work on his premises he is bound by the same legal obligation that exists as between him and his immediate servants to keep them in a suitable and safe condition, and is liable to any of the servants of such contractors for injuries resulting to them from defects therein, not under a contract obligation, but arising from the duty he owes to each of the employees, arising out of his obligation to provide such appliances, and this duty extends to keeping the premises upon which the servants of the contractor are at work, in a reasonably safe condition, whether the contract provides therefor or not."

The author cites many cases supporting the text, and takes up and considers the leading cases upon the subject.

In *Glase v. Philadelphia*, 169 Pa., 488, recovery was allowed for injuries to a boy caused by his falling through a man-hole in the roof of a pumping station, where it appeared that such roof was on a level with the ground at its rear, and was used by the public, upon the invitation of the city, as a place of rest and pleasure.

In *Smith v. Martin* [a public school teacher] and other defendants, the educational authorities of a certain borough, Law Reports (1911), 2 King's Bench Division, 775, the court held:

"Where a public corporation, which is the local educational authority for the district, conducts a public elementary school, and exercises its power of appropriating, paying and dismissing teachers therein, the relation between the corporation and a teacher employed in such school is that of master and servant, and involves the ordinary consequences with respect to the liability for the acts of a servant.

"Where one of the pupils of such schools, a girl fourteen years of age, is negligently directed by one of the teachers during school hours to poke the fire and draw the damper of a stove in the teachers' com-

mon room where the teacher proposes to have her lunch, and while the pupil is carrying out the order her pinafore catches fire, and she is severely burned, the corporation is liable to the pupil for the teacher's negligence, the act of the latter being within the scope of her employment which is not strictly confined to teaching alone."

In *Roberts v. The City of St. Mary's*, 78 Kan., 707, the plaintiff sued to recover damages for the death of her husband through alleged negligence of the city in allowing a windmill, a part of the municipal water works system, upon which he was at work for the city, to become defective and dangerous, thereby causing his death. The windmill had been for several years in charge of the city marshal, who superintended the repairs thereon, employed workmen for that purpose, gave them directions, and approved their bills, which were audited by the council and paid by the city. The deceased was oiling the mill when he fell from a ladder affixed to the tower of the windmill, the ladder being in a decayed and defective condition, causing the rungs to loosen and give way. The condition of the ladder had been reported verbally by the marshal to the city council. There was no evidence of any official action by the Mayor and council instructing the marshal to cause the repairs to be made or placing the windmill in his charge.

The trial court instructed the jury to return a verdict for defendant, but this action was reversed.

"The city by the operation of the windmill," says the court, "supplied water for public purposes. Repairs upon it are incidental to such operation. That they were being made must have been known to the council. * * * The evidence offered tended at least to prove that when the deceased was injured he was in the employ of the city and that there was negligence in failing to furnish him a safe place to work, and should have been submitted to the jury."

Nicolai v. The Town of Vernon, 88 Wis., 551, was an action in equity to prevent the threatened removal of plaintiff's fences and the taking of a strip of his land for highway purposes. The defendants were the supervisors and pathmaster of the town were about to enter upon plaintiff's premises and remove his fence along a highway and appropriate and use for highway purposes a long strip of plaintiff's land adjoining.

The court says (p. 552):

> "The only reasonable construction of the complaint is that the supervisors and pathmaster of the town, in their official capacities, are about to remove plaintiff's fence, on the claim that it encroaches upon the public highway. This would be an act within the scope of their general official duties, and evidently done with an honest view (no bad faith being charged) to obtain for the town a benefit.
>
> *"It would be the attempted discharge of a municipal or corporate duty, as distinguished from a public or governmental duty. In such cases the municipality is liable if the acts of its officers prove to be unlawful."*

In *McCord v. The City of Pueblo* 36 Pac., Rep., 1109, where the city was authorized to construct ditches, drains and sewers, the manner of constructing them and keeping them in repair is ministerial; and the court quotes from Dillon, Mun. Corp., sec. 1048, as follows:

> "It is agreed that whenever the duty as respects drains and sewers ceases to be legislative or quasi-judicial and becomes ministerial then, although there is no statute giving the action, a municipal corporation is liable to the same extent and on the same principles as a private person or corporation would be under like circumstances for the negligent discharge or negligent omission to discharge such duty resulting in an injury to others."

In *Lenzen v. City of New Braunfels*, 13 Tex. Civ. Appeals, 335, held:

> "A city which, for its advantage and gain, has voluntarily assumed the duty of supplying its inhabitants water for general purposes and for the extinguishment of fires, is liable to a patron of its works for its negligence, whereby a failure to supply water resulted and such patron's property was destroyed by fire, which but for such negligence would have been extinguished."

In *Donahoe v. Kansas City*, 136 Missouri Rep. 657, held that "the construction of sewers in a city is a corporate and ministerial function as distinguished from a governmental one, and a city is liable for injuries arising from its negligence in the performance of the work.

> "Where the superintendent of the streets of a city, having charge of the construction of a sewer, provides all material for bracing the sides of the work and directs the manner of placing them, and the work is done accordingly, and a laborer, while working in the trench is injured because of defective bracing, such negligence is that of the city and not of a fellow servant, though a foreman was in immediate charge of the work."

In *Galvin v. New York*, 112 N. Y., 223, a driver of a cart was injured, while delivering coal at the court house, by a heavy grating, which, being negligently fastened up, fell upon him. In the opinion, the court says: "No question arises as to the defendant's negligence, and it was admitted on the trial that it owned the court house, and was charged with keeping and maintaining the same and its appurtenances in a safe and suitable condition, free from danger to those lawfully in and about the building."

In *Sullivan, Admr., v. City of Holyoke*, 135 Mass., 273, the facts were: "A city owned a building which was prin-

cipally occupied by its superintendent of streets. In 1879, naphtha was stored there by the chairman of the committee on fuel and street lights, who was also an alderman of the city. A particular portion of the building was devoted to its storage, to which the city lamplighter, an employe of the committee on fuel and street lights, had access. Naphtha was used in the street lights. In 1880, while the naphtha was so stored, an explosion of it took place, but what caused the explosion did not appear." It was held "in an action for an injury caused by the explosion, that there was evidence tending to show negligence in storing the naphtha in the building; and that it could not be ruled, as matter of law, that the city was not liable."

In *Carrington v. The City of St. Louis*, 89 Mo., 212, the plaintiff sustained injuries by falling against iron trap doors of a cellar way in a sidewalk. The doors covered a cellarway opening into a building used by the police commissioners as a police station. The doors had been opened by a policeman, who painted them, propped them open with a stick and left them in that position to dry.

The court says (p. 215):

> "Again, the city is liable for the negligent use of its own property the same as private corporations. Dill. Mun. Corp. 3d Ed. Sec. 985.
>
> "The bill of exceptions in this case recites that it was shown by the defendant that the police station, the building belonged to and was occupied by the board of police commissioners. We do not understand by this that the title to the property was in them, or that they could hold title to real estate. The building was evidently furnished by or at the expense of the City of St. Louis. We conclude that as to the act in question Battie was the officer and agent of the city, and that his knowledge of the condition of the trap door was notice to and knowledge thereof on the part of the city."

In *Hannon v. The County of St. Louis*, 62 Mo., 313, the county of St. Louis made a contract for laying water pipe to the county insane asylum, the work being done under the supervision of the county engineer, and while a trench was being dug in the grounds of the asylum, it caved in and killed one of the workmen, it was held that the duty in which the county was engaged was not one imposed by general law upon all counties, but a self-imposed one; that *quoad hoc* the county was a private corporation, engaged in a private enterprise (more especially as the work was being done on its property), and governed by the same rules. In such a case it is immaterial, whether the performance of the work is voluntarily assumed in the first instance, or is a special duty imposed by the legislature, and assented to by the county. And municipal corporations and quasi corporations are subject to the same doctrine of liability.

The case of *City of Toledo v. Cone*, 41 Ohio St., 149, 163, was an action to recover damages for personal injuries, sustained by the falling upon an employe of the city of an embankment supporting a vault in the city cemetery. The court said: (p. 163):

> "The improvement or repair of the city vault through their agency (trustees of the city cemetery in question, elected by the people) and that of the superintendent, was not a legislative or governmental act on the part of the city, but was merely the discharge of a ministerial duty, such as the city performs in repairing or improving its streets, sewers and wharves. It lay within the legislative capacity, judgment and discretion of the city to provide a cemetery for the burial of the dead, and to build requisite vaults; but, having become the owner of such property, the city in managing it was held to the same degree of care in preventing damage to others as would be required of natural persons."

In *Horahan v. City of Baltimore*, 114 Md., 518, the court held that:

"Where a municipal corporation employs a contractor to build a sewer, under the supervision and control of a municipal officer, the city is liable for any negligence of the contractor in the performance of the work."

On page 533, the court says:

"We may properly observe here that in a city, the sub-surface of whose streets is filled with water pipes, gas pipes, telephone and telegraph conduits and other agencies, it is of importance that in all excavations made in the streets due care should be taken to protect and safeguard those agencies so as to secure after as before such excavations, and that the life and property of abutting residents should be protected from injury that might result from such negligence."

It makes no legal difference that no privity or contract existed between the defendant and Tyrrell (or his immediate employer, Forsberg). The defendant, having entered into a contract with the Gormley-Poynton Company, which provided, among other things, for the installation of a boiler plant, smoke-breechings, smoke-stack, etc., in the old building, on well-established principles of law, the defendant extended an invitation, express and implied, to mechanics who might be engaged in the performance of the work to come upon the premises, and the law imposed the duty upon the defendant to keep its premises in such condition as that the same would not be or become imminently dangerous to the lives of those mechanics.

In *Piper v. City of Madison*, 140 Wis., 311, the court held:

"In selling and distributing water to its citizens by means of a system of water works a city is acting not in its governmental but in its private or proprietary ca-

pacity, and is liable in damages for negligence of its agents and servants in the conduct of such business.

"The fact the city may also use the water works for protection against fire does not relieve it from liability for negligent acts of its servants or agents in the conduct of the business, except for such acts as are performed by them in the actual work incident to extinguishing fires."

"Where a city maintains a municipal lighting plant, it is not exercising a governmental function, so as to escape responsibility for negligence causing an injury to the person or property of an individual."

Brantman v. City of Canby, 138 N. W., 671, 119 Minn., 396.

Where vacant premises are injured by leakage and consequent explosion of gas, the explosion being immediately by a policeman in searching for a leak, presenting a lighted candle at the cellar opening, the leakage is the efficient and predominant cause of the injury, so as to charge the light company.

Consolidated Gas Co. v. Getty, 96 Md., 683 (1903).

The escape of gas from the pipes of a gas company is *prima facie* evidence of negligence. *Smith v. Boston Gas Light Co.*, 129 Mass., 318; *Fullerton v. Glens Falls Gas & Electric Light Company*, 141 N. Y. Supp., 838.

Failure of a gas company to use ordinary care to inspect its mains and pipes at reasonable intervals to discover defective conditions is actionable negligence. *Louisville Gas Co. v. Guelat*, 150 Ky., 583.

A landlord is liable to his tenant caused by an explosion of gas negligently permitted by the landlord to escape into the leased premises. *Kimmell v. Burfeind*, 2 Daly (N. Y.), 155.

Bailey v. City of Winston, 72 S. E., 966 (N. C.), a city will be liable for the negligence of a contractor in its employ where the work is performed under the direct control of the city's own officers. If otherwise liable, city will continue, although it has no control over the work of a contractor, and although in its agreement with the contractor, it is stipulated that he shall be liable for accidents occasioned by his negligence.

In *Lookout Mountain Iron Co. v. Lea*, 144 Ala., 169, the court held that one employed by an independent contractor to work in defendant's mine as the servant of the contractor, is not a mere licensee, but is there in the exercise of a lawful right; that he does not assume the risk of the negligence of the defendant's servants.

If some other cause operates with the negligence of the defendant to produce injuries to the plaintiff, this will not relieve the defendant from liability, if his wrong concurring with some other cause, was the proximate cause of the injury. *Baldwin v. Greenwood Turnpike Co.*, 40 Conn., 238; *Ring v. City of Cohoes*, 77 N. Y., 83; *Gould v. Shermer*, 101 Ia., 582; *Yoders v. Amwell Township*, 172 Pa., 447; *Magee v. Jones County*, 142 N. W. (Ia.), 957.

Where a city undertakes the construction or repair of a public work, it assumes the performance of a ministerial function, and for its failure to exercise reasonable care, or if in the doing of the work, a nuisance results, the city will be liable in resulting damages for injuries to person or property.

Hines v. City of Nevada (Iowa), 130 N. W., 182.
Randolf v. Bloomfield, 77 Iowa, 50.
Vogt v. Grinnell, 123 Iowa, 332.
Jacksonville v. Lambert, 62 Ill., 519.
Mayor v. Richardson, 90 Miss., 1.
Ashley v. Port Huron, 35 Mich., 296.
Fitzgerald v. Sharon, 143 Iowa, 730.

Loughran v. DesMoines, 72 Iowa, 382.
Bennett v. Marion, 119 Iowa, 473.
Hollenbeck v. Marion, 116 Iowa, 69.
Pittman v. City of N. Y., 125 N. Y. Supp., 942.

The prosecution of a public work is ministerial in its character.

The City of Logansport v. Wright, 25 Ind., 513.

The case of *Meares v. The Commissioners of the Town of Wilmington*, 9 Iredell Rep., 73, held that the power, or rather the duty, enjoined upon the corporation, to repair, is not one of those public, gratuitous duties for which the corporation should not be held responsible.

A municipal corporation is liable for damages arising for negligence, either in the construction or repair of public works, wherever the repair is a duty. *Allentown v. Kramer*, 73 Pa., 409; *Willey v. Allegheny*, 118 Pa., 490; *Elliott v. Philadelphia*, 75 Pa., 347; *Kies v. Erie*, 169 Pa., 598; *Glase v. Philadelphia*, 169 Pa., 488; *Corbalis v. Newberry Township*, 132 Pa., 9; *Dalton v. Tyrone*, 137 Pa., 18; *Barthold v. Philadelphia*, 154 Pa., 109.

In the *City of Chicago v. Selz*, 202 Ill., 545, held: "A city is liable for damages caused by the negligence of its servants in repairing a water pipe, where the water system is used not only for fire protection but also to sell water to inhabitants and street sprinkling contractors."

"A city is not liable," says the court, "under the doctrine of *respondeat superior*, for the unlawful or negligent acts of its officials in the exercise of the police power, and if the break had resulted from the negligence of firemen engaged in the line of their duty in extinguishing a fire, the defendant would not be liable. (Cases.) The injury to plaintiff did not arise from negligence in the use of the hydrant for the pur-

pose of extinguishing a fire. The business of selling water to inhabitants and street sprinkling contractors is not an exercise of the police power, and the city is not exempt from liability for negligence in maintaining such system."

In *Vincent v. City of Brooklyn*, 31 Hun., 122, it is held that "the provisions exempting the city of Brooklyn from liability in damages for the nonfeasance or misfeasance of the common council, or of any officer of the city appointed by it, do not relieve it from liability for the damages occasioned by the death of a person lawfully in the municipal building, which was caused by an explosion of illuminating gas resulting from the negligence of the keeper of the building."

"The instant case differs widely from the ordinary action for damages against a city growing out of accidents happening to pupils in attendance at a school building for a defect in the building, where the city holds title to the real estate and a school board has exclusive charge, not only of the management and conduct of the school, but also active control of the real estate itself, and charged with the duty to repair. In this case, the city has title and ownership *with the right to control the property and the duty laid upon the city to repair.*"

Jackson v. London County Council and Chappell (1912), 10 Knights Local Government Reports, Court of Appeals (affirming S. C., 10 K. L. C. G Reports, K. B. D., page 75).

The defendant council, who had the control and management of a provided school, employed a builder (defendant Chappell) to carry out certain repairs to the ceiling of the school. Chappell, for that purpose, sent to the school a truck of wet rough stuff—a mixture consisting of four parts sand and one part of lime and a

little hair—which, at the suggestion of the caretaker, was placed in a corner of the boys' playground. Two days later the school reopened, and the head master gave instructions to the school caretaker to have the stuff removed as he considered it was dangerous; and the caretaker telephoned to the contractor to remove it. The stuff, however, was not removed, as the man who was sent did nothing. The teachers prevented the boys interfering with the stuff while they were in the playground during the intervals, but when the boys came out of the school, in the afternoon, they, including the plaintiff, began to pelt each other with the stuff. One of the boys threw some at the plaintiff, and it struck him in the face and injured his eye.

In an action by the plaintiff against the education authority and the builder, the jury found that both were negligent, and that the negligence was the cause of the accident, and they awarded £50, apportioning £25 against each defendant.

Bray, J., on a motion for judgment held that there was evidence upon which the jury could find that both defendants had been guilty of negligence, and he entered judgment for £50 against the defendants generally, with costs.

On appeal,

Held, that the head master having in his evidence admitted that he knew of the presence of the stuff and that he considered that it was dangerous for it to be left ungaurded in the playground, the judgment was rightly entered against the defendant council; and further, that the defendant Chappell having been told to see that it was removed before the school was reopened, the fact that he had sent a man to remove it who did not do so, was some evidence of negligence against him also.

Martin v. Board of Fire Commissioners, 132 La. Rep., 188 (February 17, 1913).

"Where employees of a fire department of a city needlessly hitch to an engine a pair of untrained horses and attempt to drive through the streets of a city, and, through some cause or other, these horses go upon a sidewalk with the engine and injure a pedestrian, who has an undoubted right to be upon the sidewalk, the injured person has a cause of action for his injuries."

(f) Defendant Not Exempt from Liability for Infliction of Positive Wrong on Tyrrell Even if in Exercise of Governmental Function.

Weightman v. The Corporation of Washington, 1 Black, 39, decided in 1862, was an action commenced in the Circuit Court of the United States for the District of Columbia by Weightman to recover damages for injuries sustained by him from the falling of a bridge. The trial court instructed the jury that the plaintiff could not recover, on the ground that the corporation was invested with power over the bridge merely as an agent of the public, and was, therefore, not responsible for the nonfeasance or misfeasance of the persons necessarily employed by them to accomplish the object for which the power was granted. The plaintiff excepted, and took the case to the Supreme Court. That court held that where a specific and clearly defined duty is enjoined in consideration of the privileges and immunities which the act of incorporation confers and secures, and the means to perform the duty are placed at the disposal of the corporation, or are within its control, it is clearly liable for injuries to persons or property arising from the neglect to perform the duty enjoined, or for negligence or unskillfulness in its performance; corporations, like individuals, are liable for the negligent and unskillful acts of their agents and servants whenever those acts occasion special injury to the person or property of another; and that where a bridge is placed under the sole con-

trol and management of a corporation by its charter, the burden of repairing or rebuilding the bridge is imposed upon it, if ample means are placed at its disposal or within its control to enable it to perform the duty enjoined.

Speaking to the attempt of the defendant to sustain the directed verdict, the court uses the following language:

> "It is not, however, upon any such ground that the defendants attempt to sustain the instructions, but they insist that, being a municipal corporation, created by an Act of Congress, they are invested with the power over the bridge merely as agents of the public, from public consideration and for public purposes exclusively, and they are not responsible for the nonfeasances or misfeasances of the persons necessarily employed by them to accomplish the object for which the power was granted. Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty. But the duties arising under such grants are necessarily undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens imposed, and the consequent responsibilities arising, under another class of powers usually to be found in such charters, where a specific and clearly defined duty is enjoined in consideration of the privileges and immunities which the

Act of Incorporation confers and secures. Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public, if they unreasonably neglect to comply with the requirement of the charter; and it is equally clear, when all the foregoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence and unskillfulness in its performance. At one time it was held that an action on the case for a *tort* could not be maintained against a corporation; and, indeed, it was doubted whether *assumpsit* would lie against a corporation aggregate, since it was said the corporation could only bind itself under seal; but courts of justice have long since come to a different conclusion on both points, and it is now well settled that corporations, as a general rule, may contract by parol, and, like individuals, they are liable for the negligent and unskillful acts of their servants and agents, whenever those acts occasion special injury to the person or property of another. Whether the action in this case is maintainable against the defendants or not, depends upon the terms and conditions of their charter, as is obvious from the views already advanced."

The court then proceeds to an analysis of the charter, using the following language:

"By the 2d section of their charter it is provided, among other things, that they shall continue to be a body politic and corporate, * * * 'And, by their corporate name, may sue and be sued, implead and be impleaded, grant, receive, and do all other acts as natural persons.' They may purchase and hold real, personal and mixed property, and dispose of the same

for the benefit of the city. Large and valuable privileges also are conferred upon the defendants; and the 13th section of the charter provides, in effect, that the defendants shall have the sole control and management of the bridge in question, * * * 'and shall be chargeable with the expense of keeping the same in repair, and rebuilding it when necessary.' Comment upon the provision is unnecessary, as it is obvious that the duty enjoined is as specific and complete as our language can make it; and it is equally clear, that the bridge is placed under the sole control and management of the defendants; and, in view of the several provisions of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge was imposed upon the defendants, in consideration of the privileges and immunities conferred by the charter. Most ample means, also, are placed at the disposal of the defendants, or within their control, to enable them to perform the duty enjoined. Whatever difference of opinion there may be as to the other conditions required to fix the liability, on this one, it would seem, there can be done, as the defendants have very large powers to lay and collect taxes on almost every description of property, real and personal, as well as on stocks and bonds and mortgages; and they also derive means for the use of the city from granting licenses, and from the rents and profits of real estate which they own and hold. All the conditions of liability, therefore, as previously explained, concur in this case."

The court accordingly held the peremptory instruction erroneous, and reversed the judgment of the trial court. The views expressed by the court in the *Weightman* case have never been departed from by the Supreme Court, but, on the contrary, have been frequently reaffirmed. There is no substantial pertinent difference between the charter of the Corporation of Washington and that of the District of Columbia, treating its organic act of June 11, 1878, as the charter of the latter corporation.

Attention has already been called to the fact that the statutes impose a specific and clearly defined duty on the District of Columbia in its municipal capacity to construct and repair public school buildings, and that the means to perform that duty are placed at the disposal of the corporation. There is no distinction, and no reason for any distinction, between the duty of the District of Columbia to build and repair bridges, and its duty to build and repair public school buildings, nor is there any case decided by the Supreme Court of the United States which affords any foundation for any such distinction.

Barnes v. District of Columbia, 91 U. S., 540, in error to the Supreme Court of the District of Columbia, decided in 1876, was an action to recover damages for a personal injury received by the plaintiff October 14, 1871, in consequence of the defective condition of one of the streets of the City of Washington. The court held that a corporation can act only by its agents or servants; that the Board of Public Works of the District of Columbia is a part and an agency of that municipal corporation, whether its power comes to it by the appointment of the President, or by the Legislative Assembly, or by election, and the corporation is liable for its acts or omissions; and that a municipal corporation is liable for an injury to an individual arising from negligence in the construction of a work authorized by it, and for an injury arising from a defective condition of its streets, although the fee of the streets is not in the municipal corporation.

The court analyzes the act of February 21, 1871, under which the District of Columbia, municipal corporation, was originally organized, and then says:

> "A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The Legislature may

give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again, it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. *We do not regard its acts as sometimes those of an agency of the State, and at others those of a municipality;* but that, its character and nature remaining at all times the same, it is great or small according as the Legislature shall extend or contract the sphere of its action.
* * * * * * * * *

"In the case of the municipal corporation before us, we have no doubt that the Governor and the Legislative Department are equally representatives and agents of that body, unaffected by the circumstance that the one is appointed by the President and the others are elected by the people; or that the one is paid from one source, and the others from another source. They are severally members and parts of a municipal corporation, whose charter emanates from the Congress of the United States, and by which their powers and authority are conferred or defined."

Speaking to the point whether the Board of Public Works was also a part and an agency of the municipal corporation, the court said:

"The authorities state, and our knowledge is to the effect, that the care and superintendence of streets, alleys and highways, the regulation of grades, and the opening of new and closing of old streets is peculiarly a municipal duty. No other power can so wisely and judicially control this subject as the authority of the immediate locality where the work is to be done. * * * In inquiring, therefore, where this power was vested in a particular case, we should expect to find that it was given to the municipality."

The court then recurs to the act of February 21, 1871, in considerable detail, touching the status of the Board of Public Works, and concludes that the Board was not independent, but was subordinate both to Congress and the Legislative Assembly, and was a part and agency of the District of Columbia municipal corporation. The doctrine that a municipal corporation, as distinguished from a corporation organized for private gain, is not liable for the injury to an individual arising from negligence in the construction of a work authorized by it was expressly repudiated by the court. The court reviews at length the case of *Bailey v. Mayor*, 3 Hill, 531, 2 Denio, 433, and calls attention to the fact that the judge delivering the opinion of the Supreme Court of New York "repudiates the argument arising from the fact that the commissioners were appointed by the State; that the defendants had no control over their action; that they were bound to employ them, and submit to the independent exercise of their control. He held that the commissioners were the agents of the city, and that the latter were responsible for their negligent conduct."

Attention is then called to the fact that in the judgment of affirmance by the Court of Errors of the State of New York, "*Chancellor* Walworth based his opinion of affirmance chiefly upon the fact that the city was the owner of the land upon which the dam was built, and, therefore, liable for the negligent conduct of those who built it. Senators Hand, Bockee and Barlow based their judgment of affirmance on the ground that the commissioners were the agents of the city. Gardner, Lieutenant-Governor, delivered an able dissenting opinion."

Comparing the *Bailey* case with the *Barnes* case, under consideration, the court then said:

> "This case is nearer to the one we are considering than any other reported in the books. The struggle

in the New York courts was between *the dictates of that evident justice and good sense, which required that the city should indemnify a sufferer for the loss arising from the acts of those doing a work under its authority and for its benefit,* and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it.

"If these courts had had before them the additional facts which exist in this case, to wit: that in the very statute which made the City of New York a municipal corporation, these persons had been appointed to do everything necessary to be done respecting the care and improvement of the streets, being invested with their exclusive control; that without that body, and two other equally independent bodies (to wit: the mayor and the Legislative Assembly, neither of them being declared in words to be part of the municipal body), the municipal corporation had no one part of an organized existence—we think they would have arrived at the same conclusion, but would have found less difficulty in choosing a ground on which to place their judgment.

"In the case before us, we think that Congress intended to make the Board of Public Works a portion of the municipal corporation. The governor, or mayor, as he would ordinarily be called, represented the Executive Department; the Legislative Assembly, like a common council, had the exclusive authority to pass all laws or ordinances upon the large class of subjects committed to its charge, with certain specified restrictions; and to the Board of Public Works, like an ordinary agent of the corporation, was given the exclusive control of the streets and alleys. Names are not things. Perhaps there is no restriction on the power of Congress to create a State within the limits of the District of Columbia; but it does not make an organization a State to call its mayor a Governor or its common council a legislative assembly, or its superintendent of streets a Board of Public Works, especially when the statute by which they are created

> opens with a declaration of its intention to create a municipal corporation. We take the body thus organized to be a municipal corporation, and that its parts are composed of the members referred to; and we hold, therefore, that the proceedings by that body, in the repair and improvement of the street out of which the accident in question arose, are the proceedings of the municipal corporation. That in such case the corporation is responsible, we have already cited the authorities to show."

The court says that "no doubt there are authorities holding views not in all respects in harmony with those we have expressed," and then cites and reviews *Thayer v. Boston,* 19 Pick., 510; *Walcott v. Swampscott,* 1 Allen, 101, and *Child v. Boston,* 4 Allen, 41.

It is pointed out that *Child v. Boston,*

> "is in hostility to *Roch. W. Lead Co. v. Rochester,* 3 N. Y., 463, where the city was held liable because it constructed a sewer which was not of sufficient capacity to carry off the water draining into it. The work was well done; but the adoption and carrying out of the plan was held to be an act of negligence. The *Boston* case, however, holds that if a sewer, originally well constructed, becomes defective by reason of low lands being filled up so that the outflow is obstructed, it is the duty of the city so to extend the sewer that its efficiency shall be restored, and that for a failure to do so it becomes liable to those whose property is injured by the overflow of the sewer. In its practical results, this is one of the strongest cases to be found in favor of municipal liability."

The court then says that the circumstance that the fee of the streets in the District of Columbia is in the United States, and not in a municipal corporation, is immaterial to the case; that the streets and avenues in Washington have

been laid out by competent authority; that the power and duty to repair them is undoubted, and would not be different were the streets the absolute property of the corporation; that the only questions can be as to the particular person or body by which the power shall be exercised, and how far the liability of the city extends. The court accordingly reversed the judgment of the general term. Mr. Justice Field dissented on the ground that he did not think the District of Columbia should be held responsible for the neglect and omission of officers whom it had no power to select or control, his opinion being that the Board of Public Works was an independent body. The case of *Barnes v. District of Columbia* has never been questioned in the Supreme Court of the United States, but, on the contrary, has been frequently reaffirmed.

District of Columbia v. Woodbury, 136 U. S., 450, in error to the Supreme Court of the District of Columbia, decided in 1890, was an action for damages for personal injuries suffered by the plaintiff, arising from the fact that while passing on the sidewalk near the north entrance of the Riggs House on G street, at the city of Washington, he fell into a hole. The plaintiff's claim was that the sidewalk was not in a safe condition for use by the public, and that the District authorities had been grossly negligent in not keeping it in proper repair. The plaintiff recovered a verdict and judgment for $15,000.00, and that judgment was affirmed by the General Term.

The Supreme Court held that the municipal corporation called the District of Columbia, created by the organic act of June 11, 1878 (20 St. L., 102), is subject to the same liability for injuries to individuals arising from the negligence of its officers for maintaining in safe condition for the use of the public the streets, avenues, alleys, and sidewalks of the city of Washington as was the District under

the laws in force when the cause of action in *Barnes v. District of Columbia*, 91 U. S., 540, arose; and that the *Barnes* case has never been questioned, but is again affirmed. The court makes an extended analysis of the provisions of the act of 1878, and carefully reviews the *Barnes* case, and calls attention (p. 455) to the fact that "The Act [of June 11, 1878] places the police, *schools*, Board of Health, and sanitary inspectors of the District all under the charge and control of the Commissioners."

The court expresses its opinion as to the liability of the District for the negligence complained of, as follows (p. 457):

> "Without further discussion, we adjudge, upon the authority of *Barnes v. District of Columbia*, that the District is liable for such negligence upon the part of its officers as is charged in the plaintiff's declaration. That case was determined in 1875, and has never been questioned by any subsequent decision in this court. On the contrary, its authority was recognized in *Metropolitan Railroad v. District of Columbia*, and in *Brown v. District of Columbia*, 127 U. S., 579, 586, and the principles announced in it were applied in *District of Columbia v. McElligott*, 117 U. S., 621. If the rule announced in the *Barnes* case is not satisfactory to Congress, it can be abrogated by statute."

The doctrine of the *Woodbury* case has never been departed from by the Supreme Court, but on the contrary has been frequently reaffirmed.

The statutes which we have cited show that the duty and obligation of the District of Columbia relative to the construction and repair of public school buildings are precisely the same as its duty and obligation to construct and repair the streets, avenues, alleys, gutters, sewers, and bridges in the District of Columbia. The controlling principle is ex-

actly the same, and the source of duty is identical, namely, the Congress. It is very wide of the mark to say that the municipal architect is independent of the District of Columbia, and it is equally impossible to sustain the contention that because the Board of Education has control of the school system as such, the District of Columbia is not liable for a positive injury inflicted by it on the person or property of a citizen, in consequence of its own nonfeasance or misfeasance in the construction or repair of public school buildings, especially as the duty and obligation to construct and repair such buildings are expressly imposed upon the District of Columbia as ministerial, administrative, private, corporate, municipal duty and obligation, and there is not a line of law imposing such duty upon the Board of Education, or giving it any such power or authority.

The doctrine that the District of Columbia, as a municipal corporation, acts in a dual capacity, the one private and the other public, and that it is liable for injuries resulting from its nonfeasance or misfeasance in its former capacity, but is exempt from liability in the latter capacity, is a fallacy, and will not stand the light of critical analysis, sound reason, or controlling authorities. ~~This court is bound by the decisions of~~ The Supreme Court of the United States, ~~and that court~~ has directly ruled, on the authority of *Weightman v. Corporation of Washington, Barnes v. District of Columbia*, and *Woodbury v. District of Columbia*, that no such dual capacity exists, and that no such exemption is allowable. Such ruling was announced in *Workman v. New York, Mayor, Aldermen and Commonalty*, 179 U. S., 552, decided December 24, 1900. In that case Workman was the owner on June 11, 1893, of the British barkantine "Linda Park." On the date named, while the vessel was moored to a dock at Pier 48, in East River, in New York City, she was struck and injured by the steam fireboat "New

Yorker." At the time of the collision the "New Yorker" was running into the slip between Piers 48 and 49 for the purpose of getting nearer to another fireboat, which had shortly prior thereto safely entered the slip. Both the fireboats had been called to aid in extinguishing a fire located in a warehouse situated 85 to 100 feet from the slip bulkhead. To recover the damage occasioned to his vessel Workman filed in the District Court of the United States, for the Southern District of New York, a libel *in personam* against the Mayor, Aldermen and Commonalty of the City of New York. This libel was subsequently amended by adding the allegations essential to make as additional respondents the Fire Department of the City of New York, and James A. Gallagher, the person in charge of the navigation of the "New Yorker" at the time of the collision. The District Court entered a decree in favor of Workman against the City of New York and Gallagher, and dismissed the libel as to the Fire Department. 63 Fed., 298. The Circuit Court of Appeals, to which the case was taken, affirmed the decree of the District Court against Gallagher and in favor of the Fire Department, but reversed that portion of the decree which held the City of New York liable, and remanded the case with instructions to dismiss the libel as against the city. 67 Fed., 347. The case was then taken to the Supreme Court by *certiorari*. The courts below concurred in dismissing the libel as against the Fire Department on the contention that under the provisions of a named statute of the State of New York the Fire Department of the City of New York was neither a corporation nor a quasi-corporation, but was merely a department of the city, and as no controversy was made respecting the correctness of the decree in this particular the Supreme Court dismissed this subject from view. There was no substantial controversy as to the premise of fact upon which the personal de-

cree against Gallagher was rendered by the courts below. The District Court, on the assumption that the local law controlled, determined that by that law, as declared in decisions of the courts of the State of New York, the city was liable for the injury caused by the negligent management of its fireboat. The Circuit Court of Appeals, however, was of the opinion that the City of New York was not answerable for the injury inflicted, for the reasons which it thus stated, and which the Supreme Court quotes, as follows (p. 556):

> "It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derive their appointment from, and are paid by, the corporation itself. In selecting and employing them, the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate powers; and hence they are the agents or servants of the public at large. Upon this principle it has uniformly been decided by the courts that municipal corporations are not liable for the negligence or wrongful acts of the officers of the police or health departments committed in the course of their ordinary employment. Unless the duties of the officers of the fire department are of a different complexion, and they are the servants of the municipality because they are engaged in performing one of its corporate functions, the same principle must extend immunity to the municipality for the negligent acts of these officers and their subordinates.
> * * * * * * * * *

"It is quite immaterial that the duties of these officers are defined and the offices created by the charter or organic law of the municipality; the test of corporate liability for the acts of the officers of the municipality depends upon the nature of the duties with which they are charged; if these, being for the general good of the public as individual citizens, are governmental, they act for the State. If they are those which primarily and legitimately devolve upon the municipality itself, they are its agents."

The Supreme Court says that the Circuit Court of Appeals, having thus determined the general principle by which the liability of the city was to be judged, reviewed some of the decisions of the Court of Appeals of New York, and deduced from them that the city, in the operation of the fireboat, performed a governmental, and not a corporate function, and therefore under the assumption that the decisions in question were authoritatively controlling, held the city not liable. The direct questions considered by the Supreme Court were, first, whether in the decision of the controversy the local law or the maritime law should control, and, second, if the case was solely governed by the maritime law, whether the city of New York was liable. The court held the case controlled by maritime law, and the city liable, in an elaborate opinion, during the course of which it is very clearly pointed out that although the property of the municipal corporation cannot be seized in execution on a judgment against it, because of reasons of public policy, nevertheless it may stand in judgment, and its exemption from execution is no exemption from liability; that is to say, the right to recover exists against the municipality whether the cause of action has relation to a governmental or corporate duty, but the remedy by seizure in execution is permanently suspended on grounds of public policy.

At page 564 the court says that it is neecssary to deter-

mine what relation the city of New York bore to the fire-boat and those in control of it, and proceeds to say that the fire department of the city of New York, as constituted when the collision occurred, was established by certain laws of 1882; that in the statute it was declared that for all purposes the local administration and government of the city and county of New York should continue to be in and be performed by the corporation, that is, the mayor, aldermen and commonalty of the city of New York; that eleven enumerated departments in said city were established, among which was a fire department; that provision was made for a board of fire commissioners, to act as the executive head of the department, to be nominated by the mayor, by and with the consent of the board of aldermen, and to be removable for cause by the mayor, subject to the approval of the Governor of the State; that the muncipal direction of the affairs of the department, including the preservation of the real and personal property used by it, was confided to this board of commissioners, but the city was made liable for all expenses of maintenance and operation, and was the owner of all the property of the fire department; and that it was also provided that any damage caused by the authorized destruction of buildings to stay the progress of fire should be borne by the city of New York. The court further says (pp. 564-565) that it unquestionably appears that the fire department of the city of New York was an integral branch of the local administration and government of that city; that the ministerial officers who directed the affairs of the department were selected and paid by the city; that all the expenses of the department of every kind and nature were to be borne by the city, which was bound by all contracts made for such purposes; that all the property of the department, including the fireboats, belonged to the city; and that the city was liable in case of an authorized destruction

on land of property of individuals to prevent the spread of a conflagration; and the court adds (p. 565) that upon such a state of things it is clear that the relation of master and servant existed between the city of New York and those in charge of the fireboat. The court also says (p. 565) that it is not gainsaid that, as a general rule, municipal corporations, like individuals, may be sued; in other words, that they are amenable to judicial process for the purpose of compelling performance of their obligations; true it is, that under the general law growing out of the public nature of their duties, where judgments or decrees are entered against municipal corporations, such judgments or decrees may not, as a matter of public policy, be enforced by the levy on property held by the corporation for public uses; to which the court cites *Meriwether v. Garrett* (1880), 102 U. S., 472. The court then proceeds to state (p. 565) that as a result of the general principle by which a municipal corporation has the capacity to sue and be sued, it follows that there is no limitation taking such corporations out of the reach of the process of the courts of admiralty, as such courts within the limits of their jurisdiction may reach persons having general capacity to stand in judgment; that true, also, where admiralty process has been set in motion against a municipal corporation, public policy, it has been held, restrains a seizure of the property used for public purposes by such corporation; that this conclusion, however, is but the application of the exception as to the mode of execution of a judgment or decree against such a corporation, to which reference has been made, and its existence in the admiralty law in all cases has also been denied; that which of these conflicting conclusions, as to the exception in question, is correct, the court is not called on by the record before it to determine, since no levy of process upon the fireboat was made or attempted to be made. At page 566, the court, by Mr. Justice White, uses the following language:

"The contention is, although the corporation had general capacity to stand in judgment, and was therefore subject to the process of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law the corporation as to some of its administrative acts was entitled to be considered as having a dual capacity, one private, the other public or governmental, and as to all maritime wrongs committed in the performance of the latter functions it should be treated by the maritime law as sovereign. But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon. We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, the doctrine above stated rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted

and jurisdictional authority over the wrongdoer is undoubted."

The court then reviews at length (pp. 566-570) various cases expounding the principles just quoted, and adds (p. 570):

> "It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction. This being so, it follows that as the municipal corporation of the city of New York, unlike a sovereign, was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case at bar, because of the public nature of the service upon which the fireboat was engaged —even if such claim for the purposes of the case be conceded—was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admiralty for the wrong which the courts below both found to have been committed."

At page 572 the court says that although there are a number of cases holding that a municipal corporation is not liable for a positive injury to the person or property of an individual inflicted by its fire department, they do not rest upon the doctrine of emergency, but, on the contrary, all these cases but expound the theory of sovereign attribute, which does not control the maritime law, and cannot justify an admiralty court in refusing to redress a wrong where it has jurisdiction to do so. Concerning the suggestion that as a proceeding *in rem* could not have been maintained against the fireboat, because it was the property of the city of New York, and therefore an instrumentality employed in the performance of its municipal function, no action *in personam* was available to the owner of the injured vessel,

the court says (pp. 572-573) that it has been repeatedly declared that, subject to the exemption from process possessed by the national government, a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of such vessel; that a liability of the owners *in personam* is not dependent upon an ability to maintain a proceeding *in rem*, because of the maritime tort; that a recovery can be had *in personam* for a maritime tort, when the relation existing between the owner and the master and the crew of the vessel, at the time of the negligent collision, was that of master and servant. And that the prerequisite in admiralty to the right to resort to a libel *in personam* is the existence of a cause of action, maritime in its nature.

This extended analysis of the *Workman* case has been presented for the purpose of emphasizing the exceedingly important and significant language in which the court concludes its opinion, the words used being as follows (pp. 573-574):

> "Because we conclude that the rule of the local law in the State of New York—conceding it to be as held by the Circuit Court of Appeals—does not control the maritime law, and, therefore, affords no ground for sustaining the non-liability of the city of New York in the case at bar, we must not be understood as conceding the correctness of the doctrine by which a municipal corporation, as to the discharge of its administrative duties, is treated as having two distinct capacities, the one private or corporate, and the other governmental or sovereign, in which latter it may inflict a direct and positive wrong upon the person or property of a citizen without power in the courts to afford redress for such wrong. That question, from the aspect of both the common and municipal law, was considered by this court in *Weightman v. Corporation of Washington* (1861), 1 Black, 39; *Barnes v. District*

of Columbia (1875), 91 U. S., 540; and in *District of Columbia v. Woodbury* (1890), 136 U. S., 480. And although this opinion is confined to the controlling effect of the admiralty law, we do not intend to intimate the belief that the common law which benignly above all considers the rights of the individual, yet gives its sanction to a principle which denies the duty of courts to protect the rights of the individual in a case where they have jurisdiction to do so. For these reasons we are sedulous to say that we must not be understood as in any wise doubting the correctness of the doctrines expounded by this court in the cases just cited or as even impliedly approving contentions which may conflict with the principles announced in those cases.

"Our conclusion is that the District Court rightly decided that the mayor, aldermen and commonalty of the city of New York were liable for the damages sustained by the owner of the Linda Park."

The dissenting opinion was written by Mr. Justice Gray, for himself, Mr. Justice Brewer, Mr. Justice Shiras, and Mr. Justice Peckham, and the opinion of the majority was written by Mr. Justice White for himself, Mr. Chief Justice Fuller, Mr. Justice Harlan, Mr. Justice Brown, and Mr. Justice McKenna. But two of these nine justices are members of the Supreme Court of the United States today. It will be remembered that Mr. Justice Gray, while the Chief Justice of the Supreme Judicial Court of Massachusetts, wrote the opinion in the celebrated case of *Hill v. Boston*, 122 Mass., 344, in which he expressly declined to follow the opinion of the Supreme Court of the United States in *Barnes v. District of Columbia*, 91 U. S., 540. As the *Workman* case has never been overruled by the Supreme Court, it must be accepted by this court of appeals as controlling in the District of Columbia. So far as counsel for the appellee are aware, the *Workman* case has never been called to the attention of this court. The case of *Roth v. District of Co-*

lumbia, 16 App. D. C., 323, was decided April 3, 1900, while the *Workman* case was not decided until December 24, 1900. These two cases are in perfect accord on the large principle that the mere exercise of a governmental function does not relieve the municipal corporation from liability for a positive wrong inflicted on the person or property of the citizen.

In *Naumberg v. City of Milwaukee*, 146 Fed., 641, decided by the Circuit Court of Appeals for the Seventh Circuit, April 10, 1906, in error to the Circuit Court of the United States for the Eastern District of Wisconsin, Circuit Judges Grosscup and Baker and District Judge Anderson sitting, the Milwaukee city charter provided for the maintenance of certain draw bridges at the expense of the city, and required the Board of Public Works to appoint, subject to the approval of the common council, all bridge tenders, whose compensation should be fixed by the common council, and who might be removed at the pleasure of the Board of Public Works, or the Mayor; and the charter declared that the officers of the city should be a mayor, and as many bridge tenders, firemen, policemen, etc., as might be provided by the act, or the common counsel might from time to time direct; and the charter also provided that the mayor and aldermen, harbor-master, and bridge-tenders of the city should severally exercise within the city all the powers of policemen, etc. The court held that where the tender of a drawbridge, maintained by the city, was guilty of negligence in the operation of the bridge, causing injuries to the plaintiff, the tender's act was the act of the city in its corporate and not in its governmental capacity, for which the city was therefore responsible. The cause of action was based upon the negligence of the bridge tender in opening the draw or lift of the bridge while the plaintiff was crossing. The sufficiency of the complaint turned upon the question whether the bridge tender was

such an agent or servant of the municipality as that the latter was liable for his negligence, that is to say, whether the doctrine of *respondeat superior* applied. The Circuit Court held that the question was one of local law, that under the decisions of the Supreme Court of Wisconsin the opening of the draw was a public or governmental service, and that the doctrine of *respondeat superior* did not apply. The Circuit Court of Appeals disagreed with the Circuit Court, and reversed the judgment of the latter.

While this case expressly recognizes the doctrine that municipal corporations have a dual character, the one public and the other private, and that while acting in their capacity as governmental instrumentalities they are exempt from liability for acts done or omitted unless such liability is expressly created by statute, yet the point at which such exemption begins and ends is so briefly and accurately stated that it is well worthy of quotation. In his concurring opinion, Circuit Judge Grosscup, at pages 651-652, says that the process of operating the bridge was a special service, arising out of the discharge of a special duty not contained or contemplated in the ordinary duty of maintaining and repairing highways; that where, in the performance of such a special service, an agent is employed by the city, the city must respond for the negligence of the agent to him who has received injuries as the result of such negligence, even though the injured person be a traveler on the highway; that the liability of the city in this respect does not grow out of special statute, but is a liability which grows out of the general law in Wisconsin, and is based upon the general principle that when it is the special duty of a city, as a city, to do a given thing, and it is engaged in the attempted performance of that duty through an agent, the city must respond for the negligence of the agent; and the learned judge then says (pp. 651-652):

"These propositions, it seems to me, are inherent in the principles on which the Wisconsin cases, approximating this case, have been decided. In *Mulcairns v. Janesville*, 67 Wis., 24, 29 N. W., 565, the city was held liable for the negligence of its agent in the construction of the walls of a cistern whereby the plaintiff was injured, the court holding that it being the special duty of the city, as a city, to construct cisterns for fire purposes, and the city being engaged in the attempted performance of this duty through its own private agencies, the case was the common one of special employment for the performance of special service, for and on behalf of the city. The mere fact that the cistern was for the use of the fire department was held not to make its construction a performance by the city of its duty under the governmental power to maintain a fire department; nor the fact that without such cisterns the governmental fire department would be practically useless; nor would the fact, I take it, that men otherwise connected with the fire department may have been employed to do this special service have made the case a different one. The governmental function of the city, as to its fire department, is to put out fires. With the putting out of the fires, and the ordinary care-taking of the means through which that work is done, the governmental function begins and ends. What goes before, and what follows, though related to the putting out of fires, and essential to the fire equipment, is to be regarded as a special service in whose performance the city, like any one else, is to be held responsible for the negligence of its agents. Note this then, the point of the case cited: That though the city be not liable for the way its officers perform the duty commonly known as fire protection, that exemption from liability begins and ends just where the duty of the fire department begins and ends and is not to be extended to any other performance of duty by the city, even though such performance may contribute to the means wherewith it performs its governmental duty. In other words, the

> Wisconsin court is not extending, as the case cited shows, the exemption of a duty beyond the plain, well defined class of governmental functions upon which the New England doctrine was built up."

As applied to the instant case, conceding for the time being that the exercise of control of the local public school system is a governmental function, and operates an exemption from the results of negligence, yet the exercise of that governmental function begins and ends with the control of the public school system as such, and for any negligence arising without that sphere the exemption does not exist. At the time Tyrrell received his fatal injury the District of Columbia was not engaged in the exercise of such governmental function, nor indeed was the Board of Education so engaged, but the function in which the municipality was engaged was that, and only that, of repairing or adding to the construction of a building which it owned, and which at other times was used in connection with the exercise of the governmental function consisting of the control of the public school system of the District of Columbia. The exercise of control of the public school system is one thing, while the exercise of the duty to construct and repair is another and distinct thing. The governmental function rested upon the Board of Education, and not upon the District of Columbia, although in a large and important sense the Board of Education is not independent of the municipal corporation, but is merely an agent and part thereof. The McKinley Manual Training School was not in use as a school when the injury occurred. When the law permits an exemption from liability for negligence arising in the exercise of governmental functions it means that at the very time the negligence arises the municipality must be exercising the governmental function. The rule has no application whatever to what comes before or follows after the

period of time within which the governmental function is being actually exercised. This contention is aptly illustrated by the *Naumberg* case, and by *Johnston v. District of Columbia*, 118 U. S., 118. If the District of Columbia does not exercise a governmental function in constructing and repairing the streets, avenues, alleys, gutters, sewers, and highways, how can it be said to be exercising such a function in constructing or repairing a building which has been and, or will be, used for public school purposes?

The more one attempts to support the theory of exemption in the case of the exercise of a governmental function the less one finds of actual foundation to support it, either in reason or in the best authorities, but, as we have said, even conceding the existence of such a distinction, yet the exemption cannot be claimed unless the municipality were in the actual exercise of the governmental function at the very time the injury occurred. It is a little difficult to understand the contention that the District of Columbia was actually engaged in the exercise of a governmental function in putting a couple of new boilers and some breeching into a building which it owned, the work itself being done under the express obligation of an act of Congress which required the District to do this very work and which supplied the funds therefor. Just what attribute of sovereignty there is in placing some steam boilers and breeching in a local building we do not understand. It is our notion that this is about the lowest grade of the purely private, administrative, corporate, municipal duty that the District of Columbia can possibly perform. Is the sweeping of manure from the public streets the exercise of a governmental function? Is the creation of a nuisance by the accumulation of manure from a police-ambulance station the exercise of a governmental function? *Roth v. District of Columbia*, 16 App. D. C., 323, answers in the negative.

In the case of *Wahrman v. City of New York*, defendant, impleaded with the Board of Education, 111 App. Div., 345 (1906), the court held:

> "As the charter of the city of Greater New York makes the board of education of said city a separate corporation, and vests said board with the title to real estate used for school purposes, with power to alter, repair and inspect said school buildings through subordinates appointed and controlled by it, said board is charged with the duty of repairing said buildings and keeping them in a safe condition, and is liable for its negligence in failing to do so. Said board also occupies the relation of master and servant with its subordinates appointed by it and under its control and direction.
>
> "Hence, when a pupil has been injured by the fall of a ceiling in a school building in said city, and it is shown that an inspector of the defendant had for some years noted the defective condition of the building, the sagging of the ceilings, etc., and had reported the defects several times to said board, the board is liable for the injuries received by said pupil, if the plaintiff on his part was free from negligence contributing to the injury."

In the case just cited the plaintiff recovered a judgment for a personal injury while attending a public school in the city of New York, caused by plaster of the ceiling of the schoolroom falling upon him while he was a scholar attending the school.

The defendant contended that it could not be held liable for the negligence of its agents in allowing scholars to occupy an unsafe school building; that the doctrine of *respondeat superior* does not apply to appellant; that there was no evidence to connect the board of education with any obligation to do anything to this building to put it in con-

dition, and also that in no case of this kind is the board responsible for the tortious acts of any of its officers or agents.

The court says (p. 348):

> "An inspector of repairs of school buildings is not named in the charter of the city of New York. He was, however, undoubtedly employed or appointed and his duties specified by the appellant under the provisions of the charter to which attention will be called.
>
> "It was a question for the jury to determine whether the appellant knew or ought to have known that the room in this school building was unsafe and its occupancy dangerous by reason of the condition of the ceiling; whether a careful and proper inspection and examination by its inspectors would have given it this knowledge; and, if it would, whether they were negligent in permitting its occupancy by children during the times repairs were in progress, and the question was properly submitted to them by the trial court, providing, of course, that the appellant could be held liable for its negligence or the negligence of its servants and employees to whom it had trusted the inspection and supervision of its schoolhouses. Did the appellant owe plaintiff any duty in respect to the condition of the repair of this schoolhouse?"

After setting forth the statutes showing that the title to all real estate owned or acquired for school or educational purposes, shall be vested in the city of New York, but shall be under the care and control of the board of education, the court says (p. 351):

> "From these provisions it is apparent that the appellant has the possession and absolute control and management of all school buildings in the city of New York and is charged with the duty of repairing and keeping them in proper repair and safe condition. * * *

"It is the settled law of this State that in reference to its system of public education the municipal agencies of the State act for the sovereign and are not accountable in damages for the negligent manner in which they discharge their governmental duties or for the manner in which they carry on their work, unless other duties are also violated, but the plaintiff's case does not rest upon the assumed governmental obligation to benefit the public by education, *but upon local and ministerial duty* resting upon the appellant and all other persons and corporations who possess and manage property upon which buildings are erected and maintained, to keep them in such reasonably safe condition that persons exercising care will not be injured while in them by necessity or invitation."

This case was affirmed unanimously by the Court of Appeals of New York in 187 N. Y., 331.

In *Powers v. Philadelphia*, 18 Pa. Super. Ct., 621, the court held that—

"A city is liable for injuries to a school boy, suffered by reason of negligence in the maintenance of a dangerous boardwalk running from a main school building to an annex on property owned by the city and devoted to the use of a public school."

The court says (p. 623):

"It has been more than once said by the Supreme Court [of Pennsylvania] that distinction between the cases where municipal corporations have been held liable for torts, and where they have not, is neither entirely logical nor obvious. * * *"

The opinion refers to the case of *Kies v. Erie*, 169 Pa., 598, and says:

"The Supreme Court, while admitting that the defendant was not answerable for the neglect of an em-

ployee of its fire department, yet allowed the plaintiff to recover on the ground that the doors of the engine house, which were arranged to spring forcibly open, were shown to the satisfaction of the jury to be a negligent construction. The case of *Kier v. Erie, supra*, does not stand alone in this line of cases which hold that where real estate is held by the city and devoted to public use, injury resulting from its negligent construction or maintenance may be made the basis of a recovery of damages from the city."

In *Redfield v. School District No. 3*, 48 Wash., 85, plaintiff, a school girl, was scalded by the upsetting of a bucket of water placed on a furnace register negligently placed in the floor of the school room. The court allowed a recovery, holding that certain statutes gave such right. The court refers to *Hill v. Boston*, the line of cases following that case, and observes that many of the distinctions which are made between the performance of governmental duty and duties not considered governmental "are exceedingly flimsy and frequently seem to be distinctions without differences."

(g) Release.

The defendant specially pleaded release as follows (Record, 11):

"And for a further plea to each and every count of said declaration, the defendant, by leave of court, says that the plaintiff, as administratrix of above-named intestate, on, to wit, January 17, 1912, pursuant to an order of this court, executed a release for a valuable consideration and under seal, to Philip F. Gormley and Arthur M. Poynton, who were the contractors with defendant, as alleged in the declaration, and to G. W. Forsberg, named in said declaration, and to certain others named in said release, whereby plaintiff released and forever discharged said persons of and

from any and all claims, demands, suits, actions and causes of action whatsoever which the plaintiff, as administratrix aforesaid, had or might have against any or all of said parties by reason of the death caused by accident or otherwise of plaintiff's intestate, Conrad E. Tyrrell, while employed at, in and about work at the McKinley Manual Training School, located at 7th street and Rhode Island avenue, N. W., Washington, D. C., which death was the result of an accident occurring at said McKinley Manual Training School on or about the 2nd day of September, A. D. 1911."

To this special plea the plaintiff demurred (Record, 11-12) because it fails to aver (1) that the alleged release was in satisfaction of the plaitniff's cause of action against the defendant, or that it was intended so to be, (2) that it was in full satisfaction of the plaintiff's cause of action, (3) that the tort was a joint tort committed by the parties named in the plea and the defendant, (4) that any of the parties named in the plea was liable to the plaintiff for the tort complained of, (5) that any of said parties created or was responsible for or in any manner connected with the nuisance complained of, and (6) to set forth definitely and sufficiently matters and things constituting a release and discharge of the plaintiff's cause of action in this case.

This demurrer was properly sustained (Record, 12). The plea names certain parties as released, but does not allege that the defendant was one of them—and could not truthfully so allege, as the pleader well knew. Instead of averring that the defendant was released, the plea expressly names certain parties to whom the plaintiff "executed a release for a valuable consideration and under seal," and then evasively states that the release ran "to certain others named in said release," without naming any of the "certain others" or stating that the defendant was one of them. Moreover, the pleader merely gives his conclusion that the

instrument was a release instead of the facts showing it to be such. Had he pleaded the facts or set forth the order or release itself he would have automatically destroyed his plea; so, instead of doing this, he pleaded his conclusion that the paper was a release, and evasively alleged that it ran to the named parties "and to certain others named in said release," for the purpose of creating the impression that the defendant municipal corporation was one of such "certain others," in face of the known fact that it was not.

This then, reduces the plea to the mere proposition that an unexhibited paper writing, which the pleader calls a release, running to certain named parties, discharging such named persons from a certain tort, operates of necessity a release of another unnamed party, regardless of any of the matters stated in the demurrer. To state this proposition is to answer it.

Moreover, as the alleged release was admissible under the general issue (*Brown v. Ry. Co.*, 6 App. D. C., 237, 241; *Ry. Co. v. Howard*, 14 App. D. C., 294, and *Ry. Co. v. Snashall*, 3 App. D. C., 420, 431), the special plea was unnecessary, and the sustaining of the demurrer thereto was harmless even if the plea was good.

The testimony closed with that offered by the defendant, as there was no rebuttal presented. During its testimony the defendant made no effort to put the order or alleged release in evidence, but after its counsel had said that its case was closed, and had announced (Add. Record, 21) that it had "no further testimony," and "would like to submit some instructions," the defendant's counsel then said to the court (Add. Record, 21-22):

> "With your Honor's permission, I want to make a formal offer of proof under the general issue of the facts set out in this plea which your Honor has declined to admit, and of the fact that the plaintiff in this

case, as the record already shows, is administratrix, and that she made this settlement and that there was an order of court passed in that administration cause authorizing her to compromise and settle that claim for the death of her husband with these individuals.

"Counsel for the defendant, the District of Columbia, did not exhibit to the court or to counsel for the plaintiff any paper writing of any kind purporting to constitute a release by the plaintiff in this case, either in support of his proffer, or otherwise.

"The court having sustained a demurrer to the second plea of defendant filed in the case, thereupon sustained an objection by plaintiff to the proffer as announced by counsel for the defendant, to which ruling counsel for the defendant noted an exception and the same was noted on the minutes of the court."

This was a mere proffer, not even made at a proper stage of the case. If the defendant had actually produced the order or alleged release, the trial court would have been enabled to determine the nature and extent of it, and to understand what was really within the contemplation of the parties; but for some unstated reason, the defendant did not see fit to exhibit the alleged release or the order, either with its proffer or its plea. A defendant "will not be permitted to lay a trap for the court, and, after the court has become ensnared, claim prejudicial error." *Dowling v. U. S.* (1913), 41 W. L. R., 768, 769. Neither the order nor the alleged release appears in the bill of exceptions, and hence this court cannot pass on either. The defendant is therefore in no position to claim error in the premises. Its objection comes too late, and is founded entirely upon its own intentional fault.

In *Fields v. Bank* (1897), 10 App. D. C., 1, the court said (p. 5):

"All this was a mere proffer of evidence on the part of the defendant, which was rejected by the court; but

it does not appear that the evidence was actually produced. Neither the deed of assignment nor the power of attorney appears to have been actually produced in court, and neither is set out in the bill of exceptions, to enable this court to determine the nature and extent of the power conferred upon the defendant in respect to indorsements of negotiable paper. * * * Not only the assignment and power of attorney, but all the facts under which the indorsement was made, ought to be produced, so that the court may understand what was really within the contemplation of the parties."

The order of the probate court gave the administratrix no authority to release the District of Columbia, but she was merely "authorized to receive and accept from" the five particular parties therein named—the District of Columbia not being one of them—"the sum of two hundred dollars ($200.00) in full settlement and compromise of her claim as administratrix against said parties and each of them." The parties named presumably paid forty dollars ($40.00) each. The order recites that their offer was made "without admitting any liability." It is very certain that the court did not intend to fix the sum of two hundred dollars as the full measure of the pecuniary loss to the widow and her infant child from the wrongful death of the husband and father, and therefore did not authorize the administratrix to release all claims against all parties for the sum named. If it had been intended to release the District of Columbia it would have been expressly named in the order; and if the administratrix had actually executed a release to the District, it would have been void for want of authority in her so to do. In *Murphy v. Penniman*, 105 Md., 453, a release given, without authority, by the receivers of a bank to several directors who were jointly liable with other directors for losses

through the mismanagement of the affairs of the bank, was held not to release the others; and in *Walsh v. New York Central Ry. Co.*, 204 N. Y., 58, 97 N. E. Rep., 408, 37 L. R. A. N. S., 1137, affirming *S. C.*, 140 App. Div., 1, 124 N. Y. S., 313, and approving *Gilbert v. Finch*, 173 N. Y., 455, 66 N. E. Rep., 133, 93 Am. St. Rep., 623, 61 L. R. A., 807, it was held that proof merely that the plaintiff "settled" an action which he had brought against one tortfeasor did not operate a bar to an action against another joint tortfeasor, as a strict release would not be presumed from the word "settled," but rather a covenant not to sue.

We cannot give the language of the alleged release, because we have never seen such a paper, but the order was in full as follows:

"IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,

HOLDING A PROBATE COURT.

ADM'N. No. 18,631.

In re ESTATE OF CONRAD E. TYRRELL, DECEASED.

"This cause coming on to be heard upon the application of Susie A. Tyrrell, administratrix of the estate of Conrad E. Tyrrell, deceased, for leave to settle and compromise a certain claim presented by said administratrix against the parties hereinafter named for damages by reason of the death of said Conrad E. Tyrrell in an accident at the McKinley Manual Training School, which occurred September 2, 1910, and it further appearing that the parties hereto, without admitting any liability, have offered and agreed to pay to said administratrix the sum of two hundred dollars

($200.00) in full of any and all claims and demands against any and all of them by reason of said accident, upon consideration thereof, it is this 17th day of January, A. D. 1912:

ORDERED: That said Susie A. Tyrrell, administratrix, as aforesaid, be and she is hereby authorized to receive and accept from Philip F. Gormley and Arthur M. Poynton, formerly co-partners, trading as Gormley-Poynton Company; Evans, Almarell & Company, of New York City; the Casey-Hedges Company, of Chattanooga, Tennessee; Herbert F. L. Allen; and G. W. Forsberg, the sum of two hundred dollars ($200.00) in full settlement and compromise of her claim as administratrix against said parties and each of them by reason of the accidental death of her husband, as aforesaid; and to execute her release as such administratrix in favor of each and every of the parties above named.

WRIGHT,
Justice."

Any release overreaching this order would be a nullity, as we have already said. By way of analogy, we recall that under our law (*Code D. C.*, Sec. 323) "No executor or administrator shall sell any property of his decedent without an order of the probate court authorizing such sale; and any such sale made without a previous order authorizing it shall be void and pass no title to the purchaser." The right of action against the District of Columbia for the wrongful death of plaintiff's intestate was a valuable property right which the administratrix could not barter, sell, release, give away, or abandon, under the restrictions of the law and the order above quoted.

So far as joint contractors are concerned, our law is expressly opposed to the doctrine of automatic release or discharge of one arising from a judgment against or release to another. *Code D. C.*, Secs. 1207 (merger), 1210 (sepa-

rate compromise), 1494 (separate composition), 1525, 1211; and see also Sec. 1532 (joinder of claims in contract and tort, etc.).

The spirit and policy of our laws are therefore directly against automatic release or discharge in the case of joint contractors. The application of the doctrine in the case of joint tortfeasors is highly harsh and dryly technical, and wholly barren of any basis in modern reason, morality, or intention, and ought not to be given any effect in this case; but the intention of the parties and the probate court, as shown on the face of the papers, should govern.

In *Matheson v. O'Kane* (1912), 211 Mass., 91, the court said (95-96):

> "But where it is evident that the consideration paid to the plaintiff was not intended to be full compensation for his injuries, and the agreement signed by him although in form a release was clearly intended to preserve the liability of those who were not parties to it, many of the courts have sought to give effect to that intention by construing the agreement as in legal effect a covenant not to sue and not a technical release. As stated by A. L. Smith, L. J., in *Duck v. Mayeu* (1892), 2 Q. B. (Eng.), 511, 514:
>
> "'A rule of construction for such a document was laid down by the Court of Queen's Bench in *Price v. Barker*, 4 El. & Bl., 760, at p. 777, 82 E. C. L., 760, at p. 777, where it was held that, in determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, (96) and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release.'
>
> "And see *Edens v. Fletcher*, 79 Kan., 139, 98 Pac., 784, 19 L. R. A. (N. S.), 618; *McAllester v. Sprague*,

34 Me., 296; *Gilbert v. Finch*, 173 N. Y., 455, 66 N. E., 133, 93 Am. St. Rep., 623, 61 L. R. A., 807; *Bloss v. Plymale*, 3 W. Va., 393, 100 Am. Dec., 752; *Ellison v. Esson*, 50 Wis., 138, 6 N. W., 518, 36 Am. Rep., 830; *Carey v. Bilby*, 129 Fed., 203, 63 C. C. A., 361."

In *Bailey v. Delta Electric Light Co.*, 86 Miss., 634, the court held that in order to operate a release of the others the satisfaction received must be intended to be full compensation for all injuries inflicted, and where this is not the case all that the other tortfeasor can claim is a *pro tanto* discharge. The court said:

> "We are not unmindful that in many jurisdictions it is held that any release of one joint tortfeasor operates to absolve all others from liability. We prefer, however, to adopt the reasoning of that other numerous line of decisions which hold that in order for such release to have this legal effect, the satisfaction received by the party injured must be intended to be, and accepted as, full compensation for all injuries inflicted. This is more in accord with justice, and in better harmony with the principles of enlightened jurisprudence, which will not permit a party suffering a wrong to be deprived of his right to redress by any purely technical reasoning."

Owing to the importance placed upon the point by some of the cases in the books, it is proper to call special attention to the fact that *the order does not authorize the administratrix to execute her release under seal*, but only "to execute her release as such administratrix in favor of each and every of the parties above named"—and none other. The special plea is that the administratrix "executed a release for a valuable consideration and *under seal*." The release pleaded therefore overreached the or-

der in this respect, and consequently its legal effect must be considered as if it were not under seal.

Considering this as the case of a release not under seal, the intention of the parties is to be arrived at, and if it appears that the consideration for the release (here it was only $200.00 for the wrongful death of an able-bodied money-earning young man leaving a widow and a small child) was not accepted by the releasor in full settlement of her claim, the other tortfeasor (conceding for the moment that this is a case of joint tortfeasors—which it is not, since those named in the release were not liable at all, and expressly so insisted, as the order shows) is discharged merely *pro tanto*. *Bell v. Perry*, 43 Iowa, 368; *Meixell v. Kirkpatrick*, 29 Kan. 684; *McCrillis v. Hawes*, 38 Me., 568; *Irvine v. Milbank* (Ct. App.), 15 Abb. Pr. N. S. (N. Y.); *Matthews v. Chicopee Mfg. Co.*, 3 Robt. 711 (N. Y.); *Sloan v. Herrick*, 49 Vt., 328; *Bloss v. Plymale*, 3 W. Va. 393; *Ellis v. Eason*, 50 Wis. 138; and *Pogel v. Meilke*, 60 Wis., 250.

The instant record shows beyond a doubt that the defendant, and the defendant alone, was legally answerable for Tyrrell's wrongful death; and in this view of the case, the District of Columbia can claim no benefit from the order or alleged release. It is elementary law that a release of some who are not legally answerable in tort to the releasor, in consideration of what is therefore a mere gift or gratuity to the releasor, does not operate a release of the party who is actually liable for the tort. *Kentucky Bridge Co. v. Hall*, 125 Ind., 220; *Missouri Ry. Co. v. McWherter*, 59 Kan., 345; *Thomas v. Central Ry. Co.*, 194 Pa. St., 512. In each of these cases an action was held to lie against a corporation guilty of negligence after another corporation not in fact guilty had been released.

In the *McWherter case* the court said:

"When the wrongful act is not done jointly by the persons from whom compensation is sought, but is the deed of one or the other and not of both, we are unable to perceive on what principle a settlement [our order says "in full settlement and compromise"] with and discharge of one affects the cause of action against the other. Certainly it is not by way of estoppel, for the party not released is no party or privy to the arrangement, and has no joint interest with the one discharged."

The following cases are also directly in point: *Wardell v. McConnell*, 25 Neb., 558; *Hirschfield v. Alsberg*, 93 N. Y. Supp. 617; *Wilson v. Reed*, 3 Johns., 175; *Derosa v. Hamilton*, 3 Pa. Dist., 404; *Iddings v. Bank* (Neb. 1902) 92 N. W. Rep., 578; *Joyner v. Denny*, 45 N. C. Eq., 176; and see *Atlantic Dock Co. v. New York*, 53 N. Y., 64. The *Derossa case* was an action against three physicians for malpractice, two of whom were released by the plaintiff for a nominal consideration (the consideration for the instant release was two hundred dollars and the judgment was for seven thousand dollars), on the stated reason that they "were in no way responsible for the treatment and operation performed" (here the releasees expressly denied liability), and it was held that the release did not operate a discharge of the liability of the other defendant, since no satisfaction of the claim was thereby intended to be given or received.

In *Pittsburgh Ry. Co. v. Chapman*, 145 Fed., 886 (C. C. A.), affirming *Chapman v. Pittsburgh Ry. Co.* 140 Fed. 784, the court holds that a release of one wrongdoer will not discharge the others unless they are joint tortfeasors. In that case a brakeman was injured by coming into contact with a trolley wire while standing on the top of a freight car moving under the wire; and the court held that the negligence of the railroad company in failing to warn

its employees of the dangerous situation was an entirely distinct act of negligence from that of the trolley company in maintaining the wire in a dangerous position, and the tort not being joint, a release of the railroad company for a consideration did not prevent the brakeman from maintaining his action against the trolley company.

In the case at bar, the tort complained of was solely that of the District of Columbia; it owned the building; it was doing the work under the duty imposed upon it by the acts of Congress; the gas-pipes belonged to and were maintained by it; it was in possession and control of the building when the gas was escaping and when it exploded and killed Tyrrell; its inspector, janitor, and other employees had direct and certain notice and knowledge of the fact that gas was escaping two or three days or more before the accident, and yet did not even take the common precaution to cut it off or to discover and remedy the leak; it well knew the highly dangerous character of gas and the certainty that its escape would sooner or later result in injury or death to those compelled to work in the building; even its inspector German deluded Tyrrell into a sense of safety by telling the latter that the former was going to have the gas cut off (Add. Rec., 18). German testified (Add. Rec., 18) that when the explosion occurred he was on his way out to the corridor on his "way to the janitor to have him turn off the gas. My recollection is that on going out I told Tyrrell that I was going to have the janitor turn the gas off." German further said (Add. Rec., 19):

> "The place where Tyrrell was working was very dark. I first learned of the escaping gas early Friday morning (the explosion occurred Saturday a little after 12.30 p. m.). I did not direct the janitor to turn off the gas at this time, but on Saturday preceding the accident I looked for the janitor to have him turn off

> the gas, but it being Saturday the janitor was not to be found just at this time. This was just preceding the accident. I requested Tyrrell to find the leak of gas by asking him to smell along the pipes to see if he could detect the odor of gas, and my recollection is that Tyrrell did so, and replied that he could not detect it. This was in the forenoon of Saturday. I never went on top of the boiler. I understood gas was of a highly explosive nature."

By the testimony of this and other witnesses it was proved that none of the principal contractors or sub-contractors nor any of their employees had anything whatever to do with the gas or gas service or gas pipes in the building. None of them was therefore liable for the tort complained of, but if any of them was at fault at all it was in a respect or in respects totally alien to the tort which resulted in Tyrrell's death. That tort was solely and exclusively effected by the District of Columbia. This case, therefore, presents no element of joint tortfeasors, and consequently there is no basis whatever for invoking the doctrine of automatic release of all joint tortfeasors by the release of one.

In *Dufur v. Boston Ry. Co.* 75 Vt., 165, the court said:

> "To defeat the action the defendant must allege facts showing it was not liable, or that it and Allen were jointly liable, and that the plaintiff released Allen from such liability. If Allen was never liable, then the release given him did not affect the defendant's liability; in that case, the payment by Allen would be the act of a stranger to the cause of action."

In the case at bar, it is not shown that the defendant was not liable, but, on the contrary, it was proved that it was liable; it was not shown that the District and those named

in the alleged release were jointly liable, but, on the contrary, it was proved that they were not jointly liable and that the tort complained of was solely and exclusively that of the District alone. The parties named in the release were never liable, as the evidence conclusively shows, and hence their alleged $200.00 payment was the act of strangers to the cause of action upon which this case is based.

There is a well settled distinction now widely recognized between the effect of a release for a consideration not intended as compensation and the effect of the receipt of a sum of money regarded as compensatory damages. A release for a consideration of one not shown to be a joint wrongdoer will not operate to discharge others who are responsible. *Wagner v. Union Stock Yards & Transit Company*, 41 Ill. App., 410; *Western Tube Company v. Zang*, 85 Ill. App., 63; *Kentucky Bridge Company v. Hall*, 125 Ind., 220; *Turner v. Hitchcock*, 20 Ia., 310; *Missouri Railway Company, v. McWherter*, 59 Kan., 351; *Wardell v. McConnell*, 25 Neb., 558; *Wilson v. Reed*, 3 Johns., 175; *Atlantic Dock Company v. New York*, 53 N. Y., 64; *Thomas v. Central Railway Company*, 194 Pa., 511. These cases are founded upon the principle that where the wrongful act is not done jointly by the persons from whom compensation is sought, but is the deed of one or the other and not of both, a settlement with and discharge of one can not affect the cause of action against the other; or, stated in other words, unless the party released is liable, the consideration received for the release is not to be regarded as satisfaction and, therefore, the case does not fall within the rule that an injured party can recover but one satisfaction; and moreover such settlement can not operate by way of estoppel since the person not released is no party or privy to the arrangement and has no joint interest with

the one discharged. A careful review of the many authorities in point shows that the better doctrine is that a release to one not liable without satisfaction is no bar to proceeding against those who are liable, but that nothing short of full satisfaction, received and intended to be received as such in discharge of the entire claim for all liability growing out of the tort complained of, will operate a full and general release.

In *Hirschfield v. Alsberg*, 93 N. Y. Supp., 617, it was held that the aceptance by a person injured while passing a building by the falling of glass from a window of a sum of money from the landlord did not preclude him from recovering damages from the tenants, since on the facts as proved the landlords and the tenants were not joint tortfeasors. In *Iddings v. Citizens State Bank*, 3 Neb., 750, the court said:

> "It is well settled that a cause of action against a tortfeasor is not satisfied by a settlement with a third person, in no way a joint wrongdoer with the judgment debtor, and not shown to have been liable."

Without doubt there may be technical releases or covenants not to sue which, however effectual, in favor of the person thus relieved from liability are not effective as to another charged with the same wrong, it appearing that the person thus released was not liable. *Kentucky Bridge Company v. Hall*, 125 Ind., 220; *Gilbert v. Finch*, 173 N. Y., 455; *Miller v. Beck*, 108 Ia., 575. So, in a settlement with one tortfeasor, the right of action against another may be reserved. *Carey v. Bilby*, 129 Fed., 203 (C. C. A.); *O'Shea v. N. Y. Railway Company*, 105 Fed., 559 (C. C. A.); *Gilbert v. Finch*, 173 N. Y., 455; and *Missouri Railway Company v. McWherter*, 59 Kan., 345. A mere gratuity paid by one as to whom no claim is asserted and

nd liability contemplated will not be a satisfaction of a claim against the one liable for an injury. *Sieber v. Amundsen*, 78 Wis., 679; and *Wagner v. Union Stock Yards and Transit Company*, 41 Ill., App. 408.

In *Sloan v. Herrick*, 49 Vt., 327, it is held that the settlement of a suit by the payment of costs, or the acceptance of a sum given in consideration of its dismissal against one who had been sued for a wrong will not release another liable for the same wrong.

It is well settled that the plaintiff has the right to show by extrinsic evidence that the payment of a judgment against, or the consideration for a release of, an alleged joint tortfeasor was not a satisfaction of the plaintiff's claim. *O'Shea v. New York Railway Company*, 105 Fed., 559 (C. C. A.); and *Ryan v. Becker*, 111 N. W. (Ia.), 426.

In *American Bell Telephone Company v. Albright*, 32 Fed., 287, it was suggested, and in *Birdsell v. Shaliol*, 112 U. S., 485, it was expressly held, that satisfaction of a judgment taken for nominal damages against one wrongdoer can not be regarded as a full satisfaction for the tort, sufficient to bar recovery against a joint wrongdoer. In the latter case, the court said:

> "By our law, judgment against one joint trespasser, without full satisfaction, is no bar to a suit against another for the same trespass. *Lovejoy v. Murray*, 3 Wall., 1. The reasons are therefore stronger, if possible, here than in England for holding that a judgment for nominal damages against one wrongdoer does not bar a suit against another for a continuance of the wrong."

Attention has been called to the fact that the order of the Probate Court does not authorize the adminstratrix to exe-

cute her release under seal, and therefore if she gave any such release, it must for the purposes of this case be considered as a release not under seal. The technical release which the cases say operates a discharge of all joint tortfeasors, although it runs to but one, is, of course, the release under seal. With respect to releases not under seal, the courts have come to a more reasonable and equitable doctrine allowing the intention of the parties to the agreement to regulate the extent to which it will be given effect and treating it the same as any other unsealed contract between the parties. The consideration may be inquired into and if it proves inadequate, the terms of the instrument permitting such payment will be allowed to have effect only *pro tanto* in discharge of the wrong. The cases hold that the reservation of liability in such a release repels the presumption of full satisfaction and prevents the discharge of all, but whatever has been paid by the one released will be allowed *pro tanto* in reduction of the amount found against the other joint tortfeasor. Another way the courts are taking to prevent the discharge of the cause of action as to all the tortfeasors when such was not the intention of the party injured, and when he has not received full satisfaction, is to construe a written instrument given to one of the wrongdoers as merely a covenant not to sue that particular one, and as one judge remarks, the party injured, if he does it in the right way, may discharge one of several joint tort feasors without losing his claim against the rest, as by a covenant not to sue which does not operate as a release except in favor of the party to whom it is given. The distinctive feature necessary in an agreement in order to allow such a construction is the apparent intention not to discharge the claim, but to release only the one from liability and whatever consideration is received for such a release is held to discharge the others only *pro tanto*. If the

money received for settlement or compromise was not received in accord and satisfaction of the entire injury, a release to one does not discharge another. As we have shown, the rule is that a release to one not liable without satisfaction is no bar to proceeding against those who are liable. Of course, in order to claim any advantage from the alleged release, the District of Columbia must of necessity prove or admit that it was guilty of the tort of which the plaintiff complains, since the doctrine for which the defendant contends applies exclusively to the case of joint, and only joint, tortfeasors. In this respect the District occupies the same position which it does in claiming contributory negligence, since such a claim necessarily concedes original or primary negligence on its part. Contributory negligence by the great weight of authority must be specially pleaded since it is an affirmative defense and can not be taken advantage of under the general issue, and therefore it is well settled that a special plea of contributory negligence is a plea in confession and avoidance, that is to say, it confesses the defendant's negligence and seeks to avoid it by the plaintiff's contributory negligence. Of course, unless there be an admission of primary or original negligence, there is nothing to which the plaintiff's negligence can contribute or, stated in other words, the plaintiff can not contribute to something which has no existence.

Why did the defendant fail to produce or exhibit the order and alleged release and have them incorporated into the bill of exceptions? The court must not be left in the dark in order to lay a basis for asserting error.

(h) Prayers of Defendant.

The defendant offered fifteen written prayers (Add. Rec. 22-23), but has abandoned seven of them, namely, I, II, VI, VII, XIII, XIV and XV, ~~in this court.~~

One of our principal objects in setting forth a full statement of the case was to show that contributory negligence has no place in the case, and that there was no basis whatever to justify either a peremptory instruction on that subject or to send the question to the jury. There is not a line of testimony which warrants the defendant's statement that Tyrrell had a lighted substance at the time of the explosion. On the contrary, as our statement of the case shows, the witness Hechinger testified directly that in the boiler-room *"the lights are high up on the ceiling, and those that were in there were lighted."* (Add. Rec., 16); and the defendant's witness, German, its inspector, testified that *"The place where Tyrrell was working was very dark."* (Add. Rec., 19). And moreover, defendant's witness, Thompson, testified (Add. Rec., 21), *"There were several electric conduits in the vicinity of that gas pipe,"* and defendant's witness Chamberlain (Add. Rec., 21) testified: "I know there was (were) six conduits that lead to the old switchboard, * * * they ran down behind the boiler, between the boiler and the walls. The gas pipes that exploded, ran within a foot below it—they were on top—they were supported by an air shaft. *The conduits were old ones.*"

The evidence discloses to a demonstration that the escaping gas ignited either from the lights mentioned by Hechinger or from the electric wires referred to by the other witnesses. At least, it can be said to a certainty that there is no testimony in the record—and none was offered at the trial—showing that Tyrrell had a "lighted piece of paper," or that he was in any manner responsible for the ignition of the gas.

Defendant's prayer III was for a peremptory instruction for contributory negligence as a matter of law, at the conclusion of the entire case. No motion to direct a verdict

was made by the defendant at the conclusion of the plaintiff's case.

Prayer III was properly refused under the state of the evidence. German, defendant's witness, testified, it is true, that he requested Tyrrell to find the gas leak, by asking him "to smell along the pipes;" but Tyrrell's statement to Moore was that he was instructed by German to "look for the leak of the gas pipe." This statement went in without any objection. The jury were not bound to believe German, notwithstanding the fact that he was not affirmatively contradicted (*Davis v. Coblens*, 174 U. S., 719), and the jury may well have concluded from the statement of Tyrrell, and the method which he was pursuing to comply with the Superintendent's instructions, that German's statement was not correct.

Defendant's prayer IV was bottomed exclusively upon the false assumption that Tyrrell had a "lighted substance." The same vice existed in defendant's prayer V. In this court, defendant abandons prayer VI.

Defendant's granted prayer VIII was in the following language:

> "The jury are instructed that if they find from the evidence that neither plaintiff's intestate nor the defendant were guilty of negligence then their verdict must be for the defendant." (Add. Rec., 22).

This prayer directly sent the question of Tyrrell's negligence to the jury in the form requested by the defendant. The jury found for the plaintiff and against the defendant; and assuming, as we must, that the jury obeyed this instruction of the court, the finding of the jury necessarily was that Tyrrell was not guilty of negligence but that the defendant was,

Conclusion.

It is respectfully submitted that the judgment of the Court of Appeals should be reversed, with directions to affirm the judgment of the Supreme Court of the District of Columbia.

Alexander Wolf,
Levi H. David,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No.

SUSIE A. TYRRELL, ADMINISTRATRIX OF THE ESTATE OF CONRAD E. TYRRELL, DECEASED, PETITIONER,

vs.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT IN ANSWER TO THE PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The declaration field in the above-entitled cause in the Supreme Court of the District of Columbia alleges negligence on the part of the District of Columbia in the repair of gas pipes in the McKinley Manual Training School, in the District of Columbia, and by reason of this negligence the plaintiff's intestate was killed. The District of Columbia was constructing an addition to the McKinley Manual Train-

ing School and the plaintiff's intestate was in the employ of a machinist of one of the contractors. It appeared from the testimony that gas was detected in the room where plaintiff's intestate was working, and that on the day of the accident plaintiff's intestate was cautioned not to proceed until the leak had been discovered. It further appears that plaintiff's decedent asked one of the witnesses to bring him a match, but witness did not have a match, but brought a piece of paper; that plaintiff's decedent had a lantern in his hand, and it is presumed that with this lighted piece of paper and the lantern he attempted to discover the leak in the gas pipe. An explosion occurred, which resulted in the death of Conrad E. Tyrrell. The work that was being done was that of the construction of an addition to McKinley Manual Training School, which addition was authorized and appropriated for in 35 Stats., page 709. Submission of facts to the jury in the trial court on the theory of a nuisance created by the District of Columbia resulted in a verdict in favor of the plaintiff, which upon appeal to the Court of Appeals of the District of Columbia resulted in a reversal of the case, with the order that it be remanded for a new trial. There were many assignments of error, and the Court of Appeals based its decision upon one only, holding that it was unnecessary to decide the other questions raised in the record.

Statute Will Not Permit Certiorari.

The opinion of the Court of Appeals in this cause remanded the case to the Supreme Court of the District of Columbia for a new trial not inconsistent with its opinion. It is further true that the Court of Appeals of the District of Columbia, even with the consent of counsel for the District of Columbia, refused to make its decision final in order that a writ of error might lie. There is, therefore, no final judgment in the case justifying this court in granting the

writ of certiorari, especially in view of the fact that section 251 of the Judicial Code provides as follows:

> "In any case in which the judgment or decree of said Court of Appeals *is made final* by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by certiorari, or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court."

It is apparent, therefore, that this court cannot grant a certiorari in any case in which a final judgment has not been granted. Aside from this consideration, however, we shall undertake to review, with some brevity, the authorities on the case which justify the Court of Appeals in its decision.

ARGUMENT.

In its opinion the Court of Appeals, 41 Apps. D. C., 468-476, held:

> "That the municipal corporations in general are invested with two kinds of special powers and charged with two kinds of duties; one is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises or is implied from the use of political rights under the general law in the exercise of which it is a sovereign. The former is not held by the municipality as one of the political divisions of the State, and the latter is."

The court in continuation of its opinion held that the District of Columbia in the maintenance of its schools is in the exercise of a governmental duty in the following language:

"The duty of maintaining a system of public education for the benefit of all persons residing in the District of Columbia is a purely governmental function which is exercised by act of Congress through a board of education established thereby, though using school buildings the title to which had been acquired by the District of Columbia at a time when the system was under the management of the District Commissioners by direction of Congress. 'The duty of providing means of education, at the public expense, by building and maintaining schoolhouses, employing teachers, etc., is a purely public duty, in the discharge of which the local body, as the State's representative, is exempt from corporate liability, for the faulty construction or want of repair of its school buildings, or the torts of its servants employed therein.'" 2 Shearm. & Redf. Neg., 6th ed., sec. 267.

"The foregoing proposition has the support of the great weight of authority. See 4 Dill. Mun. Corp., sec. 1657, and notes; Hill *vs.* Boston, 122 Mass., 344, 353, *et seq.*; 23 Am. Rep., 332; Folk *vs.* Milwaukee, 108 Wis., 359; 84 N. W.; Kinnare *vs.* Chicago, 171 Ill., 332."

In answering the suggestion in the record that, though the municipality might not be liable for a single act of negligence and not be liable by reason of the maintenance of the nuisance due to the escape of gas, thereby causing injury to the plaintiff's decedent, the court, at page 475 of its opinion, quoted from Hill *vs.* Boston, 122, 344, as follows:

"'But in such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act, causing a direct injury to the property of another, outside of the limits of the public work.'

"In the instant case there was no wrongful act as a result of which the gas was permitted to escape and become a nuisance to the public outside of the building, working discomfort or danger of itself."

The prime objection sought to be raised by the petitioner in this case is that the Court of Appeals in exempting the District of Columbia from liability on the theory of a governmental function is contrary to certain decisions by the Supreme Court of the United States, as cited in his brief. We submit that sufficient answer to petitioner's petition is made if we show that the decisions of the Court of Appeals of the District of Columbia are not contrary to the brief decisions of the Supreme Court of the United States.

Counsel cites first the case of Weightman *vs.* Corporation of Washington, 1 Black, page 39. It is submitted that it was not intended in the Weightman case to decide the question of governmental function. The municipality, the city of Washington, was charged with the repair and rebuilding of the bridge, which had been the cause of plaintiff's injury, and by reason of its neglect to repair plaintiff was injured, the court held that the municipality was liable. The doctrine of the governmental function appears to have been suggested, and in answer thereto the court, at page 49, used the following language:

> "Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty. But the duties arising under such grants are necessarily undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens im-

posed, and the consequent responsibilities arising, under another class of powers usually to be found in such charters, where a specific and clearly-defined duty is enjoined in consideration of the privileges and immunities which the act of incorporation confers and secures."

The Court of Appeals in the instant case at this point quoted from the Weightman case and commented as follows:

"The ground of liability is thus stated in Weightman *vs.* Washington, 1 Black, 39:

" 'Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter.' The duty was a ministerial one.

"The Supreme Court of the United States has gone no further than this.

"In no case has it declared liability for failure to perform a purely governmental duty."

Continuing, at page 51, the Supreme Court of the United States said:

"Large and valuable privileges also are conferred upon the defendants; and the thirteenth section of the charter provides, in effect, that the defendants shall have the sole control and management of the bridge in question, * * * 'and shall be chargeable with the expense of keeping the same in repair, and rebuilding it when necessary.' Comment upon the provision is unnecessary, as it is obvious that the duty enjoined is as specific and complete as our language can make it; and it is equally clear, that the bridge is placed under the sole control and management of the defendants; and, in view of the several provisions of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge

> was imposed upon the defendants, in consideration of the privileges and immunities conferred by the charter. Most ample means, also, are placed at the disposal of the defendants, or within their control, to enable them to perform the duty enjoined. Whatever difference of opinion there may be as to the other conditions required to fix the liability, on this one, it would seem, there can be none, as the defendants have very large powers to lay and collect taxes on almost every description of property, real and personal, as well as on stocks and bonds and mortgages, and they also derive means for the use of the city from granting licenses, and from the rents and profits of real estate which they own and hold."

Petitioner then cites the case of Barnes *vs.* District of Columbia, 91 U. S., page 540. The uniform construction placed on the Barnes case has always been that the District of Columbia was responsible for negligence in the care and maintenance of its streets, a duty which is imposed upon the municipality by the statute which creates it. The decision has been followed by the Court of Appeals of the District of Columbia in every case that has to do with negligence of the municipality with reference to its streets, highways, and sidewalks.

Of the same import is the case of District of Columbia *vs.* Woodbury, 136 U. S., 450, and finds its authority in the ruling of the Barnes case. These cases are so familiar to this court that respondent will not set them out in this brief, but answers them with the contention that it was the purpose of this court to decide this doctrine only with reference to the streets and highways of the municipality. That this contention is true is, we think, evidenced by the decision of the Supreme Court of the United States in the case of Johnston *vs.* District of Columbia, 118 U. S., page 19, which seems to have been omitted from petitioner's brief, in which case it would seem that this court has recognized the doctrine of the governmental function with reference to the

selection and adoption of a sewerage system. At page 20 the court used the following language:

> "The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption o fthe general plan or system of drainage ,is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured."
>
> * * * * * * *
>
> "In Barnes *vs.* District of Columbia, 91 U. S., 540, it was said that in Rochester White Lead Co. *vs.* Rochester, 3 N. Y., 463, 'the city was held liable because it constructed a sewer which was not of sufficient capacity to carry off the water draining into it. The work was well done; but the adoption and carrying out of the plan was held to be an act of negligence.' But this was clearly a mistake; for in the Rochester case the fact was distinctly found that the insufficiency of the culvert to carry off the water was owing, not merely to the smallness of its size, but to 'the want of skill in its construction; * * * The question in judgment in Barnes *vs.* District of Columbia, as well as in Weightman *vs.* Washington, 1 Black, 39, was of municipal liability, not for an injury to property by a sewer, but for a personal injury to a traveler by a want of repair in the highway, a question not now before us."

Thus does the Supreme Court of the United States in this case determine the scope of its decision in two of the cases cited by petitioner in support of his petition for certiorari.

Petitioners cite District of Columbia *vs.* McElligott, 117 U. S., 621, which, so far as counsel for the respondent can determine, has absolutely nothing to do with the question at issue in the case at bar. We find also the same difficulty in the case of Brown *vs.* District of Columbia, 127 U. S., 579, an appeal from the Court of Claims for judgment in the sum of $200,000 for breach of contract. No case is on record where the doctrine of governmental function has been relied upon in any save an action in tort. Petitioner next cites Workman *vs.* New York City, 179 U. S., 552. It is submitted that this case was not intended by the Supreme Court of the United States to decide the question in the case at bar, and that the whole opinion is predicated upon the principles of admiralty law, and at page 574 uses the following language:

> "And although this opinion is confined to the controlling effect of the admiralty law, we do not intend to intimate the belief that the common law which benignly above all considers the rights of the individual, yet gives its sanction to a principle which denies the duty of courts to protect the rights of the individual in a case where they have jurisdiction to do so."

It is respectfully submitted that the cases cited by the petitioner do not justify his allegation that the Court of Appeals of the District of Columbia has evaded the ruling of this honorable court on this question, and it is contended further that the decision of the Court of Appeals is supported by authority of great weight, universal throughout the State courts, and in consideration of this phase of the question it is well to review the statutes passed by Congress which determine the status and relation of the school sys-

tem with reference to the District of Columbia. In 34 Statutes, pages 316-317, section 2, it is provided:

> "That the control of the public schools of the District of Columbia is hereby vested in the Board of Education, to consist of nine members, all of whom shall have been for five years immediately preceding their appointment *bona fide* residents of the District of Columbia, and three of whom shall be women. The members of the Board of Education shall be appointed by the Supreme Court judges of the District of Columbia for terms of three years each.
>
> "The Board of Education shall annually, on the first day of October transmit to the Commissioners of the District of Columbia an estimate in detail of the amount of money required for the public schools for the ensuing years and said Commissioners shall transmit the same in their annual estimates of appropriations for the District of Columbia, with such recommendations as they may deem proper."

35 Statutes, page 709, quoting from the appropriation act:

> "For the purchase of additional ground for the further extension of the McKinley Manual Training School, $100,000.00. For construction and for further extension of McKinley Manual Training School, $95,000.00."

From a perusal of these statutes it is at once apparent that the municipality has little or no control over the conduct and the management of its schools. Congress by the provision for the appointment of the school board by the judges of the Supreme Court of the District of Columbia has removed from the Commissioners the last vestige of authority in the determination of the policy of the school board, and by reason of the fact all appropriations for the building and repair of the school must be made for each individual school in particular by Congress itself. The Commissioners on behalf of the District of Columbia have therefore less voice and less control in the management of

the school, and less responsibility therefore than any other municipality in the United States. The statute as quoted above has made the Commissioners a mere conduit by which the estimates for the expense of conducting the school may be communicated from the Board of Education to Congress. The statute gives the Commissioners no right to increase or decrease the amounts of money desired by the school board for school purposes. Now, if it can be shown in other municipalities, where the municipality does have the controlling voice in the management and conduct of its school, where it does provide and appropriate the necessary funds for the equipment, conduct, and management of its school, that in these instances the municipality is exercising a governmental function, a general public duty, then much more so is it true with relation to the District of Columbia.

A leading case on this subject is that of Hill *vs.* Boston, 23 Am. Reports, 332; 122 Mass., 344. Mr. Chief Justice Gray, in an opinion which reviews all of the authorities on the subject, holds that the city of Boston, in the management and care of its schools, is performing a public duty, and as such is not liable for a tort caused by the unsafe condition of the school building. This opinion is very long, and no doubt familiar to this court, and I shall not therefore set it out *in extenso*, but desire to call the court's attention to the following language as used in the closing paragraph of the opinion:

> "But, however, it may be that where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city, as the representative and agent of the public and for the public benefit, and by a general law applicable to all cities and towns in the commonwealth, and a breach of which, in the case of a town would give no right of private action is a duty owing to the public alone, and a breach thereof by a city as

by a town is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby; and, according to the terms of the court there must be judgment for the defendant."

This case, as the court will observe, is a school case in which a child was injured by reason of the defective condition of the school building, which negligence was known to the school authorities, but, as held above, no recovery could be had.

Case of Bigelow *vs.* Rudolph, 14 Gray, 541.

"The question, then, is whether the defendants are answerable on the facts of this case for the special injury sustained by the plaintiff through their neglect to provide a safe place for her attendance at school. We are of the opinion that they are not. The wrong which the facts show was not malfeasance or mere neglect of that kind of corporate duty, for the neglect, as we have seen, the town is liable to a private action only when it is given by statute."

The case of Folk against the City of Milwaukee, 108 Wis., 359, is a case in which the death of a pupil in the school was caused by sewer gas escaping into the school building from a sewer which had negligently and with the knowledge of the city authorities been allowed to become out of repair. The court, at page 362, used the following language:

"The question is whether the city is liable for the death of a child lawfully attending one of its public schools, when such death is caused by negligently allowing the sewer of the school building to become clogged up. We think this question must be answered in the negative. This court early adopted and has consistently maintained the rule that a municipal corporation is not liable for injuries resulting from acts of defaults of its officers where it is engaged in the performance of a merely public service, from which it derives no benefit in its corporate capacity, but which it is bound to see performed in pursuance

> of a duty imposed by law for the general welfare of the inhabitants or of the community. * * * That the city is performing such a public duty in maintaining public schools cannot be doubted."

In in the case of Brown *vs.* City of New York, 66 N. Y. supplement, 382, a student was injured because of negligence of the school board in leaving the floor of the building in disrepair. In this case the court used the following language:

> "It is well settled that where a municipal corporation elects or appoints an officer in obedience to an act of the legislature, as in this case, to perform a public service, in which a corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as the servant or agent of the municipality for whose negligence or want of skill it can be held liable. Although the title of school property and buildings is vested in the city still the Board of Education has full control and custody of the same, and the municipality is not liable for the malfeasance or misfeasance of its officers or subordinates on the ground either of negligence or nuisance."

In the case of Ford *vs.* Kendall, 121 Pa. State, 543, it was held as follows:

> "In Pennsylvania a school district is but an agent of the Commonwealth and as such, a quasi corporation for the sole purpose of administering the Commonwealth system of public education; it is therefore not liable for the negligence of school directors or their employees."

It may be contended that the case at bar presents different circumstances from those cited, for the reason that in this case a laborer was injured rather than a student. It is apparent, of course, that the reason of the law would still apply, for the law considers the general public purpose and benefit from the school purposes rather than from the means em-

ployed by the municipality to carry out that purpose. However, the cases are legion as to an employee injured while working on a school building that there can be no recovery. For example, Kinneare *vs.* City of Chicago, 171 Ill., 332, a case in which a workman on a school building was killed because of a negligent condition of the building in failing to provide a proper rail or scaffolding, the court, at page 335, used the following language:

> "The State acts in a sovereign capacity and does not submit its action to the judgment of courts and is not liable for the torts or negligence of its agents and a corporation created by the State as a mere agency for the more efficient exercise of governmental functions is likewise exempted from the obligation to respond in damages, as master, for negligent acts of these servants to the same extent and as is the State itself, unless such liabilities expressly provide for the statute creating such agency. * * * The erection of the school building was of no benefit to the State as a municipality, and whatever connection it had with the Board of Education in the matter of the construction of the building was simply for the purpose of discharging a public duty cast upon it by the law-making power of the State. That duty as we have seen, is governmental in character and nature. * * *
>
> "The intestate of appellant and others engaged in the work of constructing the building, must be regarded as the servants and agents of the State and not of the city, and for that reason the doctrine of *respondeat superior* is not applicable against the city."

The same doctrine was expounded in McKenna *vs.* Kimball, 145 Mass., 557.

It would seem useless to burden this brief and the court with the hundreds of cases coming from every jurisdiction in the United States supporting the contention of the appellant in this case, and I desire, therefore, but to add Freel *vs.* Crawfordsville, 142 Ind., 27; Sullivan *vs.* Boston, 126 Mass.,

540; Ernst *vs.* Covington, 116 Ky., 850; Barnes *vs.* School District, 49 Minn., 106; Wixon *vs.* Newport, 13 R. I., 454; Eastman *vs.* Meredith, 36 N. H., 284. Sherman and Redfield on Negligence, section 267, summing up the cases on this subject, used the following language:

> "The duty of providing means of education at the public expense, by building and maintaining school houses, employing teachers, is purely a public duty, in the discharge of which, the local body, as the State's representative is exempt from corporate liability for the faulty construction or want of repair of its school building or the torts of its servants employed therein."

In conclusion, it is submitted that this case involves no question which by law authorizes or justifies this court in taking jurisdiction to consider this case. The law is clearly laid down and distinction clearly made by the Court of Appeals with reference to the kinds of cases to which this doctrine applies and the principles laid down by this court with reference to the liability of the municipality for its streets and highways have been strictly adhered to. There is no right of individuals avoided by the decisions of the Court of Appeals, nor would it seem does the mere fact of the pendency of a number of damage cases against the municipality justify this court in taking jurisdiction in a case in which well-recognized principles of law have been strictly adhered to.

Respectfully submitted,

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(27479)

INDEX OF SUBJECTS.

INDEX OF CASES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 54.

SUSIE A. TYRRELL, ADMINISTRATRIX OF THE ESTATE OF CONRAD E. TYRRELL, DECEASED, PETITIONER,

vs.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, RESPONDENT.

BRIEF FOR APPELLEE.

Statement of the Case.

The petitioner brought suit in the Supreme Court of the District of Columbia alleging negligence on the part of the District resulting in an explosion of illuminating gas in the McKinley Manual Training School, Washington, D. C., which caused the death of plaintiff's intestate. The declaration is predicated upon the theory of negligence committed by the District of Columbia during the progress of certain work upon this school building, plaintiff's intestate having been in the service of a machinist employed by one of the contractors upon this work.

The testimony discloses (R., pp. 21-28) that for a period not exceeding two days before the date of the explosion, the odor of gas could be detected in the room where plaintiff's intestate was at work; that this odor became stronger and evidenced an escape of gas at some point near where he was employed, although the District inspector, and other District agents on the premises, had been unable, after a number of attempts, to locate the point of the leak, and that on the day of the accident, and immediately prior to the explosion, plaintiff's intestate was cautioned by the District's inspector not to proceed with the work until the leak had been located.

The testimony further shows that at the time of the injury to plaintiff's intestate he called to one of his fellow-workmen and asked for a match, but did not obtain one as the workman in question had no matches, whereupon plaintiff's intestate asked for a piece of paper, which his co-employee twisted and gave to him. Plaintiff's intestate had a lantern in his hand, as it was dark on top of the boiler where he was at work, and he took the lantern and the twisted paper and turned away to look for the leak in the gas pipe, and the explosion occurred immediately.

The work in progress was the construction of an addition to and repairs in the McKinley Manual Training School building, a public school of the District of Columbia, and the gas used in this building was consumed for school purposes, mainly in the laboratory, and not for illuminating the building (R., p. 27).

The District of Columbia filed a special plea which alleged, in substance, that the plaintiff (petitioner), prior to the institution of this suit, and pursuant to an order of the Supreme Court of the District of Columbia, holding a probate court, had executed a release, as administratrix, of all claims, demands, suits, actions, and causes of action which, as administratrix, she had or might have because of the death of her intestate as the result of the accident aforesaid. To this plea a demurrer was interposed and sustained (R., p. 11) and

subsequently the District of Columbia, as a part of its case, offered to prove the facts set forth in its special plea, under the general issue. The court refused to admit testimony concerning said facts, under the general issue, and to this ruling exception was reserved on behalf of the District of Columbia. On behalf of the defendant, a number of instructions were requested, predicated upon the theory of contributory negligence by plaintiff's intestate in the light of the testimony as to his efforts to find the gas leak in the manner heretofore stated. All of said instructions were refused, and exceptions reserved (R., pp. 37-39).

In charging the jury, the trial justice entirely withheld from their consideration any question of contributory negligence, the substance of the charge being that the jury might find, by reason of the fact that illuminating gas is a dangerous substance, which may cause injury if permitted to escape, that the defendant, the District of Columbia, was guilty of maintaining a nuisance, in that the said District of Columbia had not exercised that high degree of care imposed upon it in safeguarding this explosive gas, but had permitted it to escape during the few days covered by the testimony. Exception was reserved to the refusal to charge as to contributory negligence, and also to the refusal to direct a verdict in favor of the defendant because in the erection or alteration of a public-school building the defendant was exercising a governmental function, and to the charge that the jury might find against the defendant upon the theory of nuisance.

The trial below resulted in a verdict and judgment against the District of Columbia, which judgment was reversed by the Court of Appeals on the ground that the court should have directed a verdict for the defendant because the District of Columbia was exercising a governmental function while in the performance of the work upon the school building in question. The Court of Appeals gave no consideration whatever to the assignments of error relating to contributory negligence, or to the refusal to admit the evidence con-

corning the release, holding that inasmuch as the question of governmental function was decisive, it was unnecessary to consider the other assignments of error (R., p. 50).

ARGUMENT.

Governmental Function.

Appellee's theory of the law of this case upon the principle of governmental function is as stated in 2d Dillon on Municipal Corporations, section 966, as follows:

> "Municipal corporations in general are invested with two kinds of special powers, and charged with two kinds of duties; the one kind is private, that is to say, merely municipal and for special local purposes and benefits; the other of political, governmental character, for the general public welfare."

It is submitted that it is impossible to conceive of a governmental activity more entirely governmental in character, and more intended for the general welfare of the people, than is the education of the people, and that as a necessary incident to such education, the establishment, construction and maintenance of public-school buildings. A system of free education, furnished by the State, is peculiarly an American institution, and in no way does an agency of the Government exert itself more for the general welfare and public benefit, as distinguished from private enterprise, than when it concerns itself with the education of the youth of the nation.

We submit, with great respect, that no case will come before this court at any time which will present for its consideration a higher instance of purely public service than was being rendered by this municipality in its administration of its high duty to furnish free education, when it was engaged as a necessary incident to that duty in the work upon this school building.

It seems idle to discuss the exceeding great refinement sought to be impressed upon this doctrine by counsel for appellant. In a part of his argument he urges this court to restrict the application of this doctrine so as to make the doctrine itself an absurdity, in that, for the purposes of that argument, at least, he would concede the general doctrine of governmental function as applied to schools, but would restrict the application of that doctrine so as to have it in force only at such times as the schools are actually in operation. We cannot follow such a technical refinement of reasoning as would admit the doctrine, but at the same time destroy its usefulness and render it an absurdity. Education cannot be afforded without schools, schools cannot be established without buildings, buildings must be constructed, repaired, and maintained, and only a distorted logic, and a narrow-minded and technical construction, which would lose sight of the end to be accomplished and the necessities of the situation, would grant immunity to the municipality while in the performance of one of a few of its educational duties, and deny it protection while in the performance of other duties quite as essential to the common end.

As said by the Court of Appeals in this case (R., p. 9) this court has gone no further than to hold the District of Columbia liable for defects in the public streets, and in no case has this court declared liability for failure to perform a purely governmental duty.

Johnson *vs.* District of Columbia, 118 U. S., 19, 21.
Brown *vs.* D. C., 29 Apps. D. C., 273, 282.

> "The duty of providing means of education, at the public expense, by building and maintaining school houses, employing teachers, etc., is a purely public duty, in the discharge of which, the local body, as the State's representative, is exempt from corporate liability, for the faulty construction or want of repair of its school buildings, or the torts of its servants employed therein."
>
> Sherman and Redfield on Negligence (6th ed.), sec. 267.

4 Dillon on Municipal Corporations, section 1657.
Hill *vs.* Boston, 122 Mass., 344, 353, *et seq.*
Foulk *vs.* Milwaukee, 108 Wis., 359.
Kinnearе *vs.* Chicago, 171 Ill., 332.

The public-school system of the District of Columbia is regulated by statute as follows (34 Statute, 316, 317, sec. 2):

> "That the control of the public schools of the District of Columbia is hereby vested in the Board of Education, to consist of nine members, all of whom shall have been for five years immediately preceding their appointment *bona fide* residents of the District of Columbia, and three of whom shall be women. The members of the Board of Education shall be appointed by the Supreme Court judges of the District of Columbia for terms of three years each."
>
> "The Board of Education shall annually, on the first day of October transmit to the Commissioners of the District of Columbia an estimate in detail of the amount of money required for the public schools for the ensuing years and said Commissioners shall transmit the same in their annual estimate of appropriations for the District of Columbia, with such recommendations as they may deem proper."

In the Appropriation Act (35 Statutes, 709), it was provided:

> "For the purchase of additional ground for the further extension of the McKinley Manual Training School, $100,000.00. For construction and for further extension of McKinley Manual Training School, $95,000.00."

It will be seen that Congress created a special body, appointed by the judges of the Supreme Court of the District of Columbia, to administer educational matters in the District of Columbia, and vested this independent board with full authority in the premises.

The leading case of Hill *vs.* Boston, 122 Mass., 344, reviews all of the authorities upon this question, and holds that the

city of Boston in the management and care of its schools is performing a public duty and therefore is not liable for tort caused by the unsafe condition of the school building. In the closing paragraph of the opinion, the court said:

> "But, however, it may be that where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city, as the representative and agent of the public and for the public benefit, and by a general law applicable to all cities and towns in the commonwealth, and a breach of which, in the case of a town would give no right of private action is a duty owing to the public alone, and a breach thereof by a city as by a town is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby; and, according to the terms of the court there must be judgment for the defendant."

This case, as the court will observe, is a school case, in which a child was injured by reason of the defective condition of the school building, which negligence was known to the school authorities, but, as held above, no recovery could be had.

Case of Bigelow *vs.* Rudolph, 14 Gray, 541.

> "The question, then, is whether the defendants are answerable on the facts of this case for the special injury sustained by the plaintiff through their neglect to provide a safe place for her attendance at school. We are of the opinion that they are not. The wrong, which the facts show was not malfeasance or mere neglect of that kind of corporate duty, for the neglect, as we have seen, the town is liable to a private action only when it is given by statute."

The case of Foulk against the City of Milwaukee, 108 Wis., 359, is a case in which the death of a pupil in the school

was caused by sewer gas escaping into the school building from a sewer which had negligently and with the knowledge of the city authorities been allowed to become out of repair. The court, at page 362, used the following language:

> "The question is whether the city is liable for the death of a child lawfully attending one of its public schools, when such death is caused by negligently allowing the sewer of the school building to become clogged up. We think this question must be answered in the negative. This court early adopted and has consistently maintained the rule that a municipal corporation is not liable for injuries resulting from acts of defaults of its officers where it is engaged in the performance of a merely public service, from which it derives no benefit in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community. * * * That the city is performing such a public duty in maintaining public schools cannot be doubted."

In the case of Brown *vs.* City of New York, 66 N. Y., supplement, 382, a student was injured because of negligence of the school board in leaving the floor of the building in disrepair. In this case the court used the following language:

> "It is well settled that where a municipal corporation elects or appoints an officer in obedience to an act of the legislature, as in this case, to perform a public service, in which a corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as the servant or agent of the municipality for whose negligence or want of skill it can be held liable. Although the title of school property and buildings is vested in the city still the Board of Education has full control and custody of the same, and the municipality is not liable for the malfeasance or misfeasance of its officers or subordinates on the ground either of negligence or nuisance."

In the case of Ford *vs.* Kendall, 121 Pa. State, 543, it was held as follows:

> "In Pennsylvania a school district is but an agent of the Commonwealth and as such, a quasi-corporation for the sole purpose of administering the Commonwealth system of public education; it is therefore not liable for the negligence of school directors or their employees."

It may be contended that the case at bar presents different circumstances from those cited, for the reason that in this case a laborer was injured rather than a student. It is apparent, of course, that the reason of the law would still apply, for the law considers the general public purpose and benefit from the school purposes rather than the means employed by the municipality to carry out that purpose. However, the cases are legion as to an employee injured while working on a school building that there can be no recovery. For example, Kinneare *vs.* City of Chicago, 171 Ill., 332, a case in which a workman on a school building was killed because of a negligent condition of the building in failing to provide a proper rail or scaffolding, the court, at page 335, used the following language:

> "The State acts in a sovereign capacity and does not submit its action to the judgment of courts and is not liable for the torts or negligence of its agents and a corporation created by the State as a mere agency for the more efficient exercise of governmental functions is likewise exempted from the obligation to respond in damages, as master, for negligent acts of these servants to the same extent and as is the State itself, unless such liabilities expressly provide for the statute creating such agency. * * * The erection of the school building was of no benefit to the State as a municipality, and whatever connection it had with the Board of Education in the matter of the construction of the building was simply for the purpose of discharging a public duty cast upon it by the law-making power of the State. That duty as we have seen, is governmental in character and nature. * * *

> "The intestate of appellant and others engaged in the work of constructing the building, must be regarded as the servants and agents of the State and not of the city, and for that reason the doctrine of *respondeat superior* is not applicable against the city."

The same doctrine was expounded in McKenna *vs.* Kimball, 145 Mass., 557.

It would seem useless to burden this brief and the court with the hundreds of cases coming from every jurisdiction in the United States supporting the contention of the appellant in this case, and I desire, therefore, but to add Freel *vs.* Crawfordsville, 142 Ind., 27; Sullivan *vs.* Boston, 126 Mass., 540; Ernst *vs.* Covington, 116 Ky., 850; Barnes *vs.* School District, 49 Minn., 106; Wixon *vs.* Newport, 13 R. I., 454; Eastman *vs.* Meredith, 36 N. H., 284. Sherman and Redfield on Negligence, sec. 267, summing up the cases on this subject, used the following language:

> "The duty of providing means of education at the public expense, by building and maintaining schoolhouses, employing teachers, is purely a public duty, in the discharge of which, the local body, as the State's representative is exempt from corporate liability for the faulty construction or want of repair of its school building or the torts of its servants employed therein."

So far as concerns the case of Workman *vs.* New York Mayor, etc., 179 U. S., 552, this court expressly limited the effect of that decision to the maritime law (pp. 573, 574 of the opinion), and was careful to reserve and except from that opinion the questions involved in the instant case. This case cannot be considered as decisive of the case at bar, or as opposed to the great weight of authorities and decisions supporting the position of appellee upon the question of governmental function, in the face of the statement by this court, in the Workman opinion, that "this opinion is confined to the controlling effect of the admiralty law."

In the Workman case the majority opinion cites Mersey Docks *vs.* Gibbs as authority for the proposition that the maritime law must be uniform and cannot be controlled by local decisions, which was the extent of the ruling. The minority opinion distinguishes the Mersey Docks case upon the ground that the docks company was not exercising a governmental function, but was a corporation formed for trading and other profitable purposes, and in its very nature a substitution, on a large scale, for individual enterprise, and therefore not exempt from liability as an agency of government.

In Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 1, this court recognized the doctrine of governmental function as follows (p. 8):

> "It may be conceded as a general proposition that there is a substantial distinction between the acts of a municipality as an agent of the State for the preservation of peace and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaption of the city for the purposes of residence and business."

The Facts Did Not Justify the Trial Justice in Submitting This Case to the Jury upon the Theory of Nuisance.

The evidence is uncontradicted that no odor of escaping gas was detected until the Wednesday preceding the Saturday of the accident. For a little more than two days prior to the explosion there was evidence that the odor in certain parts of the building indicated a gas leak, but the point of escape could not be definitely ascertained, although efforts were made to that end.

The injury to plaintiff's intestate was caused not directly by the escape of gas, for he was not asphyxiated or injured by inhaling the fumes, but his death resulted from the effects of the explosion, which was caused by his own efforts to discover the leak with a lighted lantern or piece of paper, after

having been warned by the District inspector to discontinue his work until the leak could be found and stopped.

There was no evidence that the odor of the escaping gas had ever been detected outside of the school building, but, on the contrary, the evidence showed that said odor was localized at or near the point of the explosion in said building.

Many cases upon the question of nuisance are cited by appellant in the petition for writ of certiorari, but they may be dismissed with this general criticism, applicable to each, that they relate to injuries occasioned by permitting dangerous substances to escape from the premises of the respective defendants, thereby working injuries to the public or to adjoining property owners or like matters, a very familiar application of the doctrine of nuisance, or were decided with reference to special enactments imposing liabilities upon corporations granted special privileges, or treat of acts the natural tendency of which is to create danger and inflict injury. Cases similar to these are so foreign to the facts of the case at bar that they appear to demand no special consideration in this brief. The Court of Appeals in its opinion (R., 50) said:

> "In the instant case there was no wrongful act as a result of which the gas was permitted to escape and become a nuisance to the public outside of the building, working discomfort or danger of itself."

And it is worthy of note that there is not a word of testimony tending in any manner to account for the existence of this gas leak or to impute to the District of Columbia any negligence or lack of care by which the leak might have been caused.

In the case of Lanigan *vs.* New York Gas Light Company, 71 New York, page 29, a case in which the gas company in discontinuing the supply of gas failed to close the surface pipe so as to effectually exclude the gas from the building; the plaintiff had been aware for a long time that gas was

escaping into his cellar; he sent servants into his cellar with a light; an explosion occurred, causing injury. The court, page 33, said:

> "The approximate cause of the explosion was the introduction of a light into the cellar by the servants of the plaintiff acting under his directions. The properties of illuminating gas in ordinary use, its inflammable and explosive character are well understood, and every person of mature years and ordinary intelligence, cannot presumably be ignorant of them. The plaintiff had been for a long time aware that the gas had escaped, and was escaping into his cellar and finding its way into other parts of the building, but must be presumed to have known that it would necessarily accumulate in larger quantities and in a more condensed form in the cellar at some point and but for short periods of time. He must be held to have known the danger of bringing a burning lamp or a lighted match in contact with this substance and to be responsible for a disregard of apparel. If he heedlessly or recklessly exposed himself or his property to the danger, he must abide by the consequences. * * * That he had frequently before exposed himself and property to the same risk and escaped with impunity, does not exempt him from the consequences of his own carelessness when damage has ensued. He cannot set up his own prior acts to justify his negligence on this occasion. The former experiment of the plaintiff did not tend to prove that it was prudent to take a lighted match or candle into the cellar, charged with this gas, as the result exclusively shows that it was not safe."

In the case of Pine Bluff Water and Light Company against Schneider, 62 Arkansas, 109, in which case a broken pipe permitted the flow of gas into the store of the appellee, and when the presence of gas was detected by the employees of the appellee one of them lighted a match and began to look for the leak an explosion was produced which injured the goods of the appellee, page 117, the court said:

> "If he had noticed that it was present in large quantities, it was gross carelessness for him to apply a lighted match to it; but if the quantity was small, or if there was nothing to cause a man of ordinary prudence, placed in the same position, to believe that there was danger of an explosion, it would not be negligent to light a match. Such question is one for the jury to determine."

In the case of Mayor and City Council of Baltimore *vs.* Marriott, 9 Maryland, 160, case in which suit was brought for a nuisance, leaving ice and snow on the street, court said:

> "A party suing to recover damages resulting to him from such nuisance must show that he used reasonable and ordinary care and diligence to avoid the injury."

In the case of Schmeer *vs.* Gas Light Company of Syracuse, 147 New York, 529, court said, on page 541:

> "The other ground of defense as to contributory negligence of plaintiff's intestate, we do not think should be taken from the jury. Sometimes it is extremely dangerous to take a light to discover the location of a gas leak and sometimes it is not, depending upon the various circumstances, among others, upon the extent of the leak, the size of the inclosure where located, and the length of time the leak has existed. The plaintiff's intestate, a boy of 18, took the candle, with the statement that he had seen gas men take a candle to find a leak, and it is a fact they do so upon some occasions. The whole case as to the contributory negligence of plaintiff's intestate should be submitted to the proper judges of fact."

In the case of Oil City Gas Company *vs.* Robinson, 99 Pennsylvania, page 1, it was held that where it was probable that gas was escaping from a leak and would find its way into a sewer the plaintiff, a civil engineer, ought to have anticipated the result and not to have entered the sewer with

a lighted lamp, such act being contributory negligence sufficient to prevent recovery.

In the case of Gaslight Company *vs.* Eckloff, 7 D. C. Appeals, quoting from the syllabus:

> "Where an inspector of water meters, while examining a meter by means of a lighted candle in a shed on the premises of a gaslight company and in company with officers of the company, who had assured him there was no danger in so doing and had demonstrated that such was the fact by themselves lighting matches first, was injured by the explosion of gas which had accumulated in the shed, it was held that the fact that the inspector apprehended danger in making the examination was not conclusive evidence of contributory negligence on his part and that the question was one for the jury."

In the case of Sherman *vs.* Fall River Iron Works Company, 2 Allen, 524, an action in tort for a nuisance created by the defendant in allowing gas to escape through the ground and into the water of a well from which horses were watered, at page 525 the court said:

> "If the injury to the plaintiff's horses and to his business was occasioned by his own carelessness in allowing the horses to drink the water after he knew it was corrupted by the gas, the effect would only be to exclude that particular element of damage. He can only recover for the natural and direct consequences of the wrongful act of the defendant, and not consequential damages which might have been avoided by ordinary care on his own part."

In the case of Baltimore and Potomac Railroad Company *vs.* Fifth Baptist Church, 108 U. S., 329, the Supreme Court of the United States defines a nuisance as follows:

> "That is a nuisance which annoys or disturbs one in the possession of his property, rendering its ordinary use for occupation physically uncomfortable to him."

Using this definition by which to measure the acts of this defendant, it cannot be said that the District of Columbia permitted a nuisance for which it should be liable in damages because gas escaped in small quantities from a gas pipe in one of the school buildings for a period of two days with knowledge of the plaintiff's decedent.

Contributory Negligence of Plaintiff's Intestate.

The trial justice withheld from the consideration of the jury the question of contributory negligence, and submitted for their consideration only the theory of nuisance.

The record is uncontradicted that plaintiff's intestate was aware that gas was escaping; that his work was so located that the odor was more noticeable to him than to any one else; that conversations took place with him and in his presence concerning the gas leak; that immediately before the explosion he asked for a match, stating that he was going to look for the leak, and that when he could not get a match he asked for and received a piece of paper so twisted as to be serviceable, if lighted, in the same manner as he had intended to use a match, and that he took this piece of paper and a lantern which he used while at work because it was dark where he was performing his duties, and retired from the view of the witnesses for the purpose of attempting to find this leak, and the explosion immediately followed, as the result of which he died. These facts are not controverted, and appear in the record (pp. 21-32).

It is submitted as an extraordinary view of the mutual rights and obligations of plaintiff's intestate and the District of Columbia that such manifest gross negligence on the part of the former, in the face of the fact that he had been instructed by the District inspector to discontinue work until this leak could be found and remedied, should not have been held to have been negligence contributing to his injury, and for that reason a bar to recovery.

The Court of Appeals (R., p. 50) said:

"It might be inferred from the evidence of the assistants of plaintiff's intestate that, failing to obtain the match that he asked for, he lighted the twisted paper with the light contained in his lantern, and in searching for the leak ignited the gas where confined in some of the recesses of the ceiling in quantity sufficient to produce the explosion that caused his death."

That court, however, merely indicated its views upon this point by way of comment, as it reversed the case upon the ground of governmental function and stated that it was unnecessary to consider this and other assignments of error.

It would seem almost a waste of time to present any argument to show that error was committed in refusing even to permit the jury to pass upon whether these facts constituted negligence contributing to the death of plaintiff's intestate. That his action in searching for the leak in the manner stated, and in doing this in direct violation of orders, was a contributing cause to his injury cannot be doubted, and that he would not have been injured but for his conduct is a practical certainty. No time need be lost in the search for cause and effect when an explosion follows immediately upon an effort to locate a gas leak with an uncovered light. Such an effort is contributory negligence, both in fact and in law, and the ruling of the trial justice upon this point is opposed to the common experience of mankind.

The cases cited under the preceding subhead are in point also upon this question of contributory negligence, as to which the trial justice refused all of the instructions asked on behalf of the appellee.

Refusal of Trial Justice to Admit Evidence of Release.

Counsel for the appellee (R., p. 37) made the proffer of a release, signed by appellant as administratrix, she having acted under the authority of the court in signing the same, in which instrument, for the consideration named therein,

she had released all claims growing out of the accident resulting in the death of her husband, which is now the cause of action alleged here. The court refused this proffer of this release, and in this ruling, we submit, that the court erred.

A demurrer to a special plea filed by the appellee, setting up this release, had been sustained by the court, and at the time of the proffer of the release the court held that such release was not admissible under the general issue plea.

This ruling was not, as counsel for appellant would have the court infer, upon the ground that the plea was defective in form, and that the release might be proven under the general issue, but was made upon the theory that the release was no defense. That this statement is correct is evident, because a defect of form in pleading cannot be reached by demurrer in the courts of the District of Columbia, but only by motion to strike out and the demurrer raised the question of the sufficiency of the defense, conceding the facts to be true. Common Law Rule 31, paragraph 3, Rules of the Supreme Court of the District of Columbia, is as follows: "Defects in pleading which were the subject of special demurrer at common law may be taken advantage of by motion to strike out, or other appropriate motion." The trial justice, upon the demurrer, ruled that such a release as set forth in the pleading constituted no defense, and it was because of this ruling that the formal offer of proof under the general issue was made (R., 37), and as the court adhered to its previous ruling, an exception was noted.

The court erred, therefore, both in sustaining the demurrer to the special plea which set up the release and in refusing the release under the general issue plea. In support thereof we desire to cite three cases from the Court of Appeals, as follows:

> Brown *vs.* Railroad Company, 6 App. D. C., 237, 241:
>
> "The declaration contains four counts, setting forth the facts attending the happening of the injury with some variation of statements; and the defendant, in the first instance, pleaded the general issue plea of

not guilty as alleged. Subsequently, during the course of the trial, and under special leave of the court, three additional pleas were filed, setting up in bar of the action three several releases of the plaintiff under seal, all of the same general import, and dated respectively August 11th, 1887, August 21st, 1887, and September 22, 1887, whereby the plaintiff, for the consideration in said releases mentioned did release and forever quit-claim and discharge the defendant from all claims or demands for damages, indemnity, or other form of compensation whatever, which the plaintiff then had or which he should or might at any time thereafter have against the defendant for or by reason of the injuries alleged in the declaration. It does not appear that there were any special replications made to these additional pleas, though the trial proceeded as if they had been simply traversed or denied. The right to file the additional pleas was denied by the plaintiff, but his objection was overruled and he excepted. But it is quite clear that such ruling of the court was not the subject of an appeal, and therefore not the subject of an exception. It was a matter that rested in the sound discretion of the trial court, as matter of amendment of the pleading. The releases, however, were admissible under the general issue plea of not guilty. Shafer *vs.* Stonebraker, 4 Gill & J., 346, 355; 1 Chitt. Pl. (1st ed.), 386."

In the case of Railroad Co. *vs.* Howard, 14 App. D. C., 294, the Court of Appeals cited the above decision as its authority on this question as follows:

> *"The release might have been proved by defendant under the general issue, without a special plea."*

The question was also before this court in an earlier case.

Railroad Co. *vs.* Snashall, 3 App. D. C., 420, 431:

Mr. Justice Shepard said:

> "The right to permit an amendment to the defendant's pleading, after the case had been called and the jury sworn for its trial, in order that a special de-

fense may be set up in bar of the action, is a matter within the sound discretion of the trial judge, and his refusal of leave will not be disturbed save for manifest error which would result in a denial of justice. There is nothing in the record to show any special or particular reason or excuse for deferring the application for leave to amend to this time.

"The amendment, if allowed, might have led to a postponement of the trial, though doubtless a demurrer to the amended plea would have been entered and sustained in obedience to the decision of the General Term upon the demurrer to the original plea, which was substantially the same in form. It now appears that the real object of the proposed amendment, though not disclosed below, was to bring that decision of the General Term before this court (law creating which had taken effect the week before) for review, by reopening the question in this way. As it is not made to appear that the court below refused the leave to amend upon this ground, we do not feel called upon to reopen the question. Moreover, had it been the express purpose to reopen the question and force a decision in the court below, the evidence of accord and satisfaction might have been offered under the pleading as it stood. Whilst it is unquestionably the better practice to plead this defense specially, yet it is probable that under the general issue the same defense might have been proved. This seems to be the rule at common law in actions on the case, and we are advised of no decision of the courts of this jurisdiction to the contrary. 2 Greenleaf on Evidence, sec. 29; 1 Chitty Pl., 478-491; Bird *vs.* Randall, 3 Burr., 1353."

"Release to One Joint Tort Feasor, Release to All."

It is contended by counsel for the appellant that the release was not a good one, for the reason that it did not run to appellee.

Granted, for the sake of argument, that the release does not run to the District of Columbia, but to all of the other tort feasors, what is the status of appellant with regard thereto?

The law is well settled that a release to one joint tort feasor is a release to all; so that, if this release, having been executed by the authority of the court by its administratrix, released any one of the joint tort feasors, whether or not it ran to appellee in particular, is immaterial.

The Supreme Court of the United States has decided this proposition in the case of the *Beaconsfield*, 158 U. S., 303, quoting:

> "A person who has suffered injury by the joint action of two or more wrong-doers may have his remedy against all for either, subject however, to the condition that satisfaction once obtained is a bar to any other proceeding."

The *Atlas*, 92 U. S., 302; Lovejoy *vs.* Murray, 3d Wallace, 1; Knickerbocker *vs.* Colver, 3d Cowan, 111:

> "The plaintiff therefore, is entitled to recover his damages but once; and, having either received them from Haas or discharged them without payment, that act must be considered the satisfaction of a release to the damages as to both."

In the case of Bennett *vs.* Railroad Company, 45 N. Y., 628, quoting from the syllabus:

> "A party receiving injuries from the wrongful act of others is entitled to but one satisfaction and to accord satisfaction by release or other discharge by the voluntary act of the party injured or one or two or more joint tort feasors is a discharge of all."

In the course of the decision in Ellis *vs.* Esson, 50 Wis., 138; 36 Am. Rep., 830; 6 N. W., 518, the court states that the delivery of a technical release under seal to one of the wrong-doers will bar the recovery against the others, for the reason that the meaning of such a release cannot be controlled by parol evidence, and the law raises a conclusive presumption that it was given in full satisfaction for the injury and for a sufficient consideration.

In an action against two joint tort feasors, where it appeared that the plaintiff had given a release under seal to one of them, discharging him from all liability, it was held that such release discharged the other also.

Urton *vs.* Price, 57 Cal., 270.

During the pendency of an action, but before trial, plaintiff received a certain sum of money from part of the joint tort feasors, and gave them general releases under seal, which the court held was an entire satisfaction as to a judgment subsequently recovered against a co-tort feasor; and that the objection that defendant, knowing of such settlement, should have made a proper plea before trial was of no force, for the reason that such transaction was not alone a defense to defendant, but it furnished him with a right to the satisfaction of the judgment.

Lewy *vs.* Fox, 22 Jones and S., 397.

The reason of the rule is stated in Bronson *vs.* Fitzhugh, 1 Hill, 185, "that the deed, being taken most strongly against the releasor, is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tort feasors, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done."

Chapin *vs.* Chicago and E. R. R. Co., 18 Ill. App., 47, holds that where plaintiff had a right of action against either of two companies for an injury, whether he could have maintained a joint action or not, a release to one discharged both. The release here was under seal.

Evidence was offered at the trial in Stone *vs.* Dickinson, 5 Allen, 29; 81 Am. Dec., 727, to prove that plaintiff had received satisfaction from some of the joint tort feasors for his alleged wrong, and had given them a written discharge of the damages he had suffered. The court held that such satisfaction and discharge in legal effect operated to release the cause of action against another joint tort feasor.

And still another is Donaldson *vs.* Carmichael, 102 Ga., 40; 29 S. E., 135, holding that a receipt given to a joint tort feasor, acknowledging the payment of a sum of money in full settlement of all damages sustained on account of the injury, bars the right of action against the other tort feasor also, and the receipt should be admitted in evidence for all purposes, and not merely to show the extent of the injury.

Counsel for appellant, in their petition for certiorari (pp. 116-117), have set forth what they claim to be a copy of an order of the probate court authorizing appellant to accept a compromise or settlement for the death of her intestate, and to execute her release as administratrix. In point of fact, no such order was introduced in evidence and it is not a part of the record, but counsel for appellant have sought to introduce it for the apparent purpose of contending that appellant was without authority to execute such a paper as is set out in the special plea.

If this court will not consider the order because it is not a part of the record, a large part of appellant's argument upon this point is without foundation. If this court should be disposed to consider said alleged order, then it is submitted that it calls for a release as commonly understood, and as was unquestionably understood by counsel who procured said order, and by the justice granting same, that is, an instrument under seal. A seal is an essential requisite of a release in the technical sense of that word as known to the common law.

Governor *vs.* Daily, 14 Ala., 469.

Conclusion.

Counsel for appellee respectfully call attention again to the errors assigned with reference to the questions of nuisance, contributory negligence, and the refusal to admit appellant's release. These errors were not regarded as necessary to be considered by the Court of Appeals, because that

court regarded the error of not directing a verdict upon the theory of governmental function as decisive in itself.

While counsel for the District of Columbia confidently believe that this Honorable Court will affirm the decision of the Court of Appeals as written, they feel that they would be derelict in their duty toward the District of Columbia if they neglected to urge in this court the other matters of error, any one of which is sufficient, in itself, to require the reversal of the ruling of the trial justice.

Respectfully submitted,

CONRAD H. SYME,
PERCIVAL H. MARSHALL,
Attorneys for Appellee.

(32136)

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1916.

TYRRELL, ADMINISTRATRIX OF TYRRELL, v. DISTRICT OF COLUMBIA.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 54. Argued November 1, 1916.—Decided March 6, 1917.

It is the duty of this court to dismiss a certiorari upon discovering that the question which induced the issuance of the writ does not arise on the record. *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association*, 242 U. S. 430.

Petitioner's intestate was killed by an explosion of gas while making repairs in a school building of the District of Columbia. Damages were recovered in the Supreme Court of the District and the judgment was reversed by the Court of Appeals. This court issued a certiorari upon the assumption (induced by a misconception of counsel) that the decision, in possible conflict with decisions of this court, proceeded on the theory that the municipality could not be held for positive torts committed by its agents while discharging its public or governmental duties. Examination of the record proving that no exception was taken by plaintiff to the rulings of the trial court in this regard and that the decision of the appellate court

turned on its conclusion that the evidence was insufficient to establish a nuisance as the cause of the accident, *Held*, that the certiorari must be dismissed.

Writ of certiorari to review 41 App. D. C. 463, dismissed.

The case is stated in the opinion.

Mr. Levi H. David and *Mr. Alexander Wolf* for petitioner.

Mr. Percival H. Marshall and *Mr. Conrad H. Syme* for respondent.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We state only so much of the case as is essential to an understanding of the disposition which we are constrained to make of it.

The action was commenced in May, 1912, by the petitioner as administratrix of the estate of her husband to recover from the District of Columbia as a municipal corporation, damages suffered as the result of his wrongful death in September, 1911. Briefly, it was alleged that the District had contracted to make an addition to a school building to it belonging known as the McKinley Manual Training School and to put in order and adjust the boilers in the basement of the old building, and that while the deceased was engaged under a sub-contractor in doing the latter work, he was killed by an explosion of illuminating gas which had escaped from the gas pipes which were in the basement. It was alleged that the gas had been permitted to escape and remain in the basement through the neglect and wrongful conduct of the municipality or its agents. The averments as to the negligence of the municipality both in permitting the escape of the gas and as to allowing it to remain after notice of the dangerous condi-

tion, and as to the absence of neglect on the part of the plaintiff's intestate were ample. There was a subsequent amendment to the petition alleging facts which it was averred established that the conduct of the District as to the escape and failure to remove the gas was equivalent to the creation by it of a public nuisance. The defense was a general denial and a special plea setting up a release on the part of the plaintiff, which latter on demurrer was stricken out. There was a verdict and judgment in favor of the plaintiff and an appeal was taken by the defendant municipality. The Court of Appeals reversed the judgment and remanded with directions to grant a new trial, one member of the court dissenting. The appellee, alleging that the case in her favor could not be bettered at a new trial, asked that a final judgment be entered upon the theory that the case would be then susceptible of review in this court on error. On the refusal of this prayer a petition for certiorari was here presented.

The basis asserted for the application for certiorari was that the court below, disregarding a decisive line of decisions by this court holding that a municipality, the District of Columbia, was responsible for positive torts committed by its servants or agents in the course of their employment under the application of the rule *respondeat superior*, had mistakenly decided that such decisions were not controlling because that principle had no application when the servants or agents of a municipality represented it in the discharge of duties which were governmental or public in character as contradistinguished from mere municipal duties,—a ruling from which it was deduced that in the former situation a wrong suffered by an individual, however grievous, was not susceptible of redress because the wrongdoer, the municipality acting through its agents, was beyond the reach of courts of justice. Besides, it was declared that although the court proceeded upon the assumption that the doctrine which

it announced was not in conflict with the previous decisions of this court, that assumption was obviously a mistaken one, since the case principally relied upon by the court to sustain the doctrine which was applied had in express terms declared that the principle announced was in conflict with a previous decision of this court, which decision was wrong and would therefore not be applied. The existence of the ground thus stated in the petition for the writ was not challenged in the opposition filed by the respondent, although the correctness of the legal propositions relied upon and the significance of the previous decisions of this court were disputed.

As on the face of the opinion of the court below the reasoning apparently justified the inference that the situation was as stated in the petition for certiorari, the prayer for the writ was granted. When, however, we come to a close examination of the record on the submission of the case on its merits, we discover that the question upon which the certiorari was prayed under the circumstances previously stated does not arise on the record and is not open for consideration, and therefore (of course, we assume, through inadvertence of counsel) the petition for certiorari was rested upon a wholly unsubstantial and nonexisting ground,—a conclusion which will be at once demonstrated by the statement which follows:

At the trial the court in express terms charged the jury that "for a mere act of isolated negligence the municipality of the District of Columbia would not be responsible, no matter what the result of the isolated act of negligence was. The District in this action, if responsible at all, can only be responsible upon the theory that the death . . . resulted from the maintenance of a nuisance, in the first place, and secondly that the District of Columbia maintained the nuisance." And this was followed in the charge by a definition of what in the law would constitute a nuisance. To this charge as to non-liability of the city for any act

of negligence whatever under the circumstances, unless there was a public nuisance, no exception whatever was taken by the plaintiff, the only exception on the subject being that reserved by the defendant to the charge that there would be a liability even in case of a public nuisance. The case therefore on the appeal below (except as to subjects having no relation to the doctrine of municipal liability) involved only the question of liability in case of a public nuisance and raised no question concerning the correctness of the ruling that the municipality was not liable for an act of individual negligence because the work which was being done when the accident occurred involved the discharge of a governmental as distinguished from a municipal duty. It is true that in the reasoning of its opinion the court below stated what it deemed to be the correct theory concerning the division of the functions of a municipality, in one of which it had power to inflict a positive wrong without redress, and made reference to state cases deemed to establish this doctrine and a decision of this court which it said was argued at bar to establish to the contrary. But this was only reasoning deemed by the court to throw light upon its conclusion on the subject which was before it, that is, whether there was liability on the part of a municipality for a public nuisance as an exception to the general rule of its non-liability for a wrong done when in the exercise of a governmental function, and as a prelude to the ground upon which the judgment rendered was rested, that is, that there was no evidence tending to support the conclusion that the facts constituted a public nuisance.

In this view it is plain that if we differed from the conclusion of the court below on the subject of the tendencies of the proof as to the nuisance, we would not be at liberty as an original question to consider and dispose of the alleged contention concerning the governmental function and the resulting non-liability for a wrong done by a

municipality, since that question under the state of the record was not before the lower court and would not be open for our consideration, as no exception concerning the ruling of the trial court on that subject was taken so as to preserve a review concerning it. As it follows that the certiorari was improvidently granted as the result of a misconception of the parties as to the state of the record and the questions open, it follows that the case comes directly within the rule announced in *Furness, Withy & Company* v. *Yang-Tsze Insurance Association*, 242 U. S. 430, and our duty is to dismiss the certiorari, thus leaving the judgment of the court below unaffected by the previous order granting the writ.

Dismissed.